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T H E
O F F I C E and D U T Y
O F
E X E C U T O R S ;

Or, A TREATISE directing TESTATORS
to form, and EXECUTORS to perform their
Wills and Testaments according to Law.

What a Man may give or dispose
of by his Will ; of Revocations
and new Publications of Wills.

Of the State of Things upon the
Testator's Death ; what may be
done by an Executor, &c.

Of proving Wills, and of the Fees
payable for the Probates.

What Things shall come to Execu-
tors by or after the Testator's
Death.

Cases between Heir and Executor ;
and of Suits by or against them ;
and of the Method of Payment
of the Testator's Debts.

Of *Devastavit* or Wasting ; and
of an executor in his own
wrong.

Of married Women and Infant
Executors ; of Legacies ; of Ex-
ecutors of Executors ; of Ad-
ministrators.

Originally compiled by that Approved and Judicious AUTHOR
T H O M A S W E N T W O R T H
of *Lincoln's Inn*, Esq;

To which is added,

The Supplement of H. CURSON, Gent. many Hundred Re-
ferences, by a Barrister of *Grey's Inn*; and since revised and
brought down to the present Time,

By **G E O. W I L S O N**, Serjeant at Law.

L O N D O N :

Printed by W. STRAHAN and M. WOODFALL, Law Printers
to the King's Most Excellent Majesty.

For, T. WALLER, W. STRAHAN, P. URIEL, B. TOVEY,
and W. FLEXNEY.

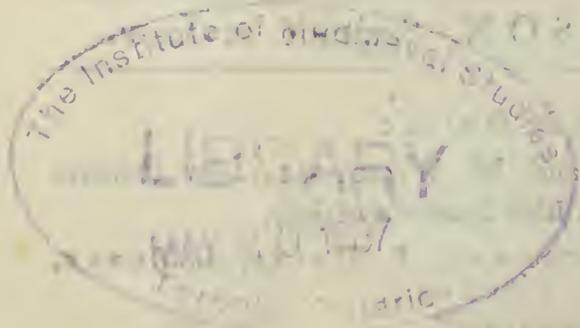
M DCC LXXIV.

OFFICE and DUTY

EXECUTORS

I Do allow the reprinting of the
Office of Executors.

FRA. NORTH.



PREFACE.

I Cannot well see or comprehend how any one legal part or theme may be more useful to and for the generality of men, and consequently more generally expedient and wished for, than the Office of Executors. For who almost is there, who either is not, or may not be an executor or administrator; or at least hath not, or may not have to do with them, either to receive from them, or to pay to them debts or legacies? Or who is there above *Forma Pauperis*, that may not be a testator or will-maker, to the guidance of whom, even in the choice of his executors and contrivance of his will, it can-

P R E F A C E.

not be but material to know the office and duty, the right and interest, the power and authority of executors? yea of each one executor, where there be divers; yea to know who may be made an executor, who not; who can make one, who not; how he may be fashioned generally or specially; what shall come to him, that cannot be given from him: yea, what goods or chattels shall go from him? Besides the knowledge for those others necessary, of the safest wards or locks for executors, their *Scylla* and *Charybdis*, and the best advantage for creditors, &c. towards or against them. To me, considering what part of law were most behoveful to be communicated to all willing readers, none appeared which could challenge of *this* the precedence, and therefore I give it the first and leading place. Thus my own thoughts.

But

P R E F A C E.

But how far this discourse may be profitable to any, and how many, *aliorum sit judicium*. How many know no more of these, than of the way of a ship upon the sea?

These are not intended for the learned of our profession who have drawn, or can draw, out of the same fountain which I did, and so need not my help, but for their sakes who are not professors of the law; yet so, as if any young students may in any part receive fruit by my labour, I shall not grudge or repine at their so doing. *Bonum, quo communius, eo melius.*

What Mr. *Wentworth* heretofore published concerning the Office and Duty of Executors, being known by experience, and many years approbation, to stand upon

P R E F A C E,

the solid and lasting foundation of the law; I conceived it more proper and advantageous for publick good, to supply what is now necessary to be added thereunto, by reason of the alterations occasioned by time, acts of parliament, and otherwise, than wholly to raise a new structure; which although with the like materials, and in the like form, yet, for want of the like time for trial, could not expect the like approbation: Therefore, as desired, I was willing to compile a Supplement to the Office and Duty of Executors, containing what I have collected from the great body of the common and statute-law of the kingdom, and which hath been omitted, or not comprised in former impressions; deducing the same from the original definitions, and rendering the whole compleat, and in all its parts conformable to the present
time,

P R E F A C E.

time, and consonant to the laws now in force: with references to the Books and Statutes at Large, authorizing and approving the same, in such a brief and regular manner as may be most ready and proper for the use and satisfaction of the judicious, instruction of the studious, and direction of those it doth or may concern.

In this Edition notice is taken, in the proper places, of such acts of parliament and resolutions of the courts of justice, as have altered the law on this subject, since the above authors wrote, and numerous references added.

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T H E

THE
O F F I C E
O F A N
E X E C U T O R.

The INTRODUCTION.

THE things considerable touching executors may all, in effect, be reduced to these three heads, *viz.*

Their *Being.*
Their *Having.*
Their *Doing.*

By the first, I intend their creation or constitution, with the incidents thereto. By the second, their interest, fruition or possession. By the third, their managing and execution of their office. This last was and is the thing principally in my intention, and the chief aim of this discourse; but necessarily it must have some *ingredients*, some *concomitants*, and some *consequents*: as he that travelleth from *London* to *York* to speak with *J. S.* must needs pass by and through other towns and villages, and speak with divers other persons in his journey and return. To come first to the first, therein we will consider these six things.

The Office of an Executor.

C H A P. I.

Of the relation between a will and an executor,

1. *Whether an executor and a will be such relatives, that one cannot be without the other; and therein of the several kinds of wills.*
2. *How and in what words an executor may be made and created.*
3. *How he may be in special manner, different from the general, fashioned, limited, or qualified.*
4. *Who may make, or be made an executor, who not.*
5. *What one may give or bequeath by will, what not.*
6. *How a will or executor once made, may be unmade, and what shall amount thereto, viz. a revocation total or partial; what to new publication.*

AS to the first; the very name of *executor* purporteth in general one to *execute* somewhat, or to whom the *execution* of somewhat is committed or recommended. In one particular thereof an executor of a will must needs be such a one to whom the execution and preformance of another man's will after his death is commended or committed; or who is constituted or authorized by the will-maker to do him that friendly office. Hence it followeth necessarily, that a will is the only bed where an executor can be begotten or conceived; for where no will is, there can be no executor: and this is so conspicuous, and evident to every low capacity, that it needs no proof or illustration. On the other side, though much may be written in the name of a will, many legacies bequeathed, and many things appointed

to

Executor, what.

Vid. Sup. p. 1.
2, 4.

The Office of an Executor.

3

to be done, * yet if no executor be named, there is no will: for these two be so relative and reciprocal, as that one cannot be without the other; if no will, no executor; if no executor no will. Yet here are two cautions to be afixed: 1. That a man's mind, will and intent touching the disposition of his goods being declared, although for want of naming an executor he die intestate, so as administration is to be committed; yet for that here is not only an inchoation or inception of a testament, but so far a progression therein as *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of goods; therefore this mind and intention of the intestate being notified and made known to the judge, who is to commit administration, is usually annexed (as I take it) to the letters of administration; and meet so to be, for a direction for and to the administrator, as well as to the will fully and perfectly made, but refused to be proved by the executor, which is usual. Another caution is, where a man seised of Land in fee-simple disposeth the same, or part thereof, by his will in writing, this standeth good for the whole or part, according to the difference of the tenure, altho' no executor be named: so as the party dieth intestate, and administration is to be committed, as touching his goods; and yet hath a will, as touching his lands. This may seem strange: but the reason thereof is an act of parliament, enabling to dispose of land by will in writing; and for that land is not properly testamentary; neither hath the executor (if any be) any thing to do or

* Plow. Com. 185.
Swinb. 7. 238.
Pick Finch 167.
† Testamentum, quasi testatio mentis.
What regard is to be paid to a man's declaration of his will where no executor is named.

Will of lands good by statute.

32 H. 8. c. 1.

Noy Max. 4.

* Testament, as it were the witnessing of the mind.

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intermeddle therewith : and therefore is the making or not making of an executor, nothing pertinent to the validity or invalidity of this devise or disposition of lands by will. So as though where there is not *testatio mentis*, there is not *testamentum* ; yet may there be the first without the latter. Having now seen that bequests of legacies, without making of executors, doth not amount to a will ; let us now consider whether the sole making of executors in the name of a will, without giving any legacy, or appointing any thing to be done by executors, whether, I say, this be or amount unto a will or not ; since here upon the matter nothing is willed, and consequently nothing rests to be executed by the executors, whose office is, as hath been said, to execute the mind, will, and intent of their testator ; and, *Ubi non est testatio mentis, non est testamentum*, say the canonists. For answer hereunto, confessing that indeed to be the office of an executor, I yet conceive confidently, that in the case above put there is a good will, and as a will it is to be proved, and approved for these reasons : First, for that the main and principal part of an executor's office, and that which concerns the soul of a testator (as our books speak) is the payment of his debts : now who knows not that the very making of an executor is the constituting of such a person who is to pay all debts ? and for that cause and end is principally to have and enjoy all the goods and chattels of the testator and all sums of money to him owing. So as the naming of *A.* and *B.* executors, is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the testator, and the laying upon them an obligation to pay all

The making an executor without more, amounts to a will.

Sum. Silv.
fol. 32. b.

And why it does so.

What it implies.

all his debts, and making them subject to every man's action for the same. And if the law speak thus much, since *quod necessario subintel- ligitur non deest*, what need then the party express it in his will? If he had willed more than this, as to have given this or that in way of legacy, it had been needful for him so to have set down in his will; but there is no meer necessity that every man should give legacies in his will; the estates of many will not do more than pay their debts, nor oftentimes do so much; so as if they should give any legacies, it must be a dead and a void gift. And suppose a man hath much more, and intendeth all to his wife, brother or sister, or other friend, his debts being by such persons paid; since the very making of the party executor without any more amounteth to thus much, and effecteth this, what needeth then more words? *Frustra fit per plura quod fieri potest per pauciora*; as we often speak touching legal passages. It is needless to write four lines where two are sufficient. Nor is *testatio mentis* here wanting, since the testator hath made known who shall have the administration of his goods for payment of his debts: and it is to be presumed he had no more special will, since he did not declare more, and left his executors farther to have and to do *prout lex postulat*. And who can say here is nothing to execute? Is the suing for and collecting of debts due to the testator, and paying of debts by him, nothing? Nay, it is, *in hoc negotio*, the *unum necessarium*. Besides, the making of an executor is a designment of a person to be the testator's assignee, to whom and by whom divers things may be feasible by vir-

The Office of an Executor

tue of covenants, bonds or other assurances ; as after, where we come to shew how the executor represents the person of the testator, will appear: also of one who, as our books often speak, is to dispose the testator's goods for the best advantage of his soul ; but instead of that, (since as the tree falleth, so will it lie or rest) I will say, as is most for the honour and reputation of the testator.

Of the kinds of wills.

NOW wills are of two kinds, or may be two ways made, *viz.* either by writing ; or nuncupative, that is, by words not put in writing during the testator's life ; for after the testator's death this verbal will must be reduced to writing, and have the seal of the ordinary or judge spiritual thereto affixed : and then it is as effectual and of as good validity, as if it had been in writing in the testator's life-time ; and so doth the common law allow and approve thereof.

Testamentum est duplex.

1. In scriptis,

2. Nuncupativum

Seu sine scriptis

Co. Lit. III.

Vide post Sup-

P. 7.

4 Hen. 6. 10.

If it be written,

and brought to

and approved by

the testator in

his life, it is a

will in writing.

14 H. 6. 5.

Vide 5. H. 5.

1 M. 15. and 16 Eliz.

But I advise all to make wills by writing, and not to leave them to the doubtful fidelity or slippery memory of witnesses. For, as of leases parol hath been said, that they be leases perjured or of perjury ; so of wills parol may be feared. Besides, many times a man doth speak and declare this or that part of his will, which his wife, child or friend dissuading, he letteth that purpose and part of his will to fall, and departs from it ; yet witnesses, wishing it to stand, will perhaps affirm it as part of the will.

will. As for a will-gift, and disposition of land of inheritance, if it be not fully written before the death of the testator, or done so far (at least) as concerns the disposition of lands, it cannot be for that part made good by reducing it to writing after his death. As for goods and chattels it may. Yet if it be written before the death of the testator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not only for land, as the case resolved in King *Edward VI.* his time was, but also for goods and chattels, so as there be an executor named. But whether shall we say this is a will nuncupative, or in writing? And surely I think that this is a will in writing, and not only verbal, tho' it want subscribing; for we know that many cannot write their names, but only marks, and what is that? nay, suppose one wants Hands, and cannot write so much as his name; yet doubtless this man may make a will in writing, it being written by his direction, as his will which he dictated: nor is the subscribing of the name of the maker any essential part of a deed, and less of a will, which needs not sealing, as a deed doth. Now put we the case on the other side, that many bequests or legacies be named in a will, and many things expressed to be done, and no executor is named in the writing, only by word of mouth *A.* and *B.* be named executors: this I think confidently is no will in writing, but nuncupative only; for that one essential part of the will, *viz.* making of executors is wanting in the writing. Nay, the appointing of him executor who is named in a note left with *A. B.* is no sufficient making of an executor, saith the

The Statute of 32 H. 8. is, that every person, &c. may by will in writing, &c.

6 Ed. 6.
Dyer 32.

It is a good will of lands within the said act, though not subscribed by devisor.

1 Sid. 315, 362.
But vide 29 Car. 2. c. 3.

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The number required by the statute of frauds to such will is but three.
 29 Car. 2. c. 3.
 Tit. de Test.
 Sum. Silv. f. 443. b.
 If he survive and live a long time, not causing it to be writ or attested by witness, methinks it should not stand as his will Id.

Summist. And of such nuncupative wills Mr. Perkins reasonably saith, that it properly hath place when one, suddenly taken with sickness violent, dares not stay the writing of his will, for fear of prevention by death; and therefore prays his curate and others to witness what his will is. To this will not written there must be seven witnesses, and such as come not by chance, but are especially called for that purpose, saith the *Summist.*

supra fol. 444. b.

What shall amount to a making one executor, or what words are requisite thereunto.

See Cro. Ei. 43.

HA V I N G before made it to appear, that the being of an executor is an essential part of a will, and so *de esse*, and not *de bene esse* only, of a will and testament: let us now see, first by what words an executor may be made: secondly, *de modo*, in what manner it may be done, how the power and authority of executors may be limited and divided. As to the first, though one do expressly by will name or appoint any to be executor; yet if by any word or circumlocution he recommend or commit to one or more the charge and office which pertains to an executor, it amounteth to as much as the ordaining or constituting of him or them to be executors: as if he declare by his will that *A. B.* shall have his goods after his death to pay his debts, and otherwise to dispose at his pleasure, or to that effect; by this is *A. B.* made executor, as was conceived by the judges in the late Queen's time. And long before that it was held, that if one do will only

A man may be executor, though not expressly named so, by implication. If *A. B.* be made executor and to him and *D.* some goods are devised to be disposed for his soul. *D.* is by this an executor for these.
 39 H. 6.
 Over 90.
 M. 15 & 16 El.
 21 H. 6, 6, 7,

that *A. B.* shall have the administration of goods, he is thereby made executor; yea, in the said late Queen's time, one giving divers legacies, and then appointing that his debts and legacies being paid, his wife should have the residue of his goods, so that she put in security for the performance of his will; by this, without more, was she an executor, as was held by three justices, *viz. Manwood, Harper and Mounson*, in the lord *Dyer's* absence. And so also where an infant was made executor, and *A.* and *B.* overseers, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant; by this were they held to be executors in the mean time. And if *A.* be made executor, and the testator after in his will expresseth that *B.* shall administer also with him, and in aid of him; here *B.* is an executor as well as *A.* and if *A.* refuse, *B.* alone may prove the will as executor, notwithstanding it be only said, he shall administer with *A.* and in aid of him. Thus many ways, and by divers words of implication, one may be made executor, although not expressly so named by the will. But if *A.* be made an executor, and *B.* a co-adjutor, without more, he is not by this an executor with *A.* as in King *Hen. VI.* his time was held: nor hath such co-adjutor or overseer any power to administer, or intermeddle otherwise than to counsel, persuade and advise; yet I think he may, and in conscience should so do. And if that will not prevail to rectify negligence or miscarryings in executors, he shall well perform the trust reposed in him, if he complain in the spiritual court or court of conscience:

and

Vid. post. Sup.
139.

The office of a
co-adjutor.

21 H. 6. 6.
24 Ed. 3.
F. Exec. 121.
29 Ed. 3 39.

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and it is reason I think that so doing upon just cause, his charges be borne out of the testator's estate, or the executor's purse, who otherwise would not be reformed.

How an executor, or his executorship may be limited or qualified in special manner different from the general.

NOW let us see how this making of an executor may be specially qualified. And first, the time may be limited when he shall first begin to be executor; and that either certainly, or with some contingency. Secondly, the creation may be conditional. Thirdly, it may be partial or dividedly, and not intirely.

Vid. post. Sup.
p. 129.
Certainly, contingently.
Conditionally on condition precedent or subsequent.
Vide Greyf-broke and Fox, Plowd. A. and B. made executors; but not B. to intermeddle during the life of A. and good.
32 H. 8.
Bro. 155.
3 H. 6. fo. 6.

As to the first, one may appoint *J. S.* to be his executor a year or more time after his death; this is good. So also if *A.* appoint *B.* his son to be his executor when he shall come to full age, and in the mean time he dieth intestate. Again one may appoint the executor of *A.* to be his executor: And then if he die before *A.* he is intestate until *A.* die. This creation may also be conditional, and the condition may either be precedent or subsequent. In the time of King *Hen. VI.* one did name *A.* and *B.* his executors, and if they would not take it upon them, then *C.* and *D.* should be his executors, and *A.* and *B.* refused; and the question was, whether in suit against the debtors of the testator, *A.* and *B.* should join with *C.* and *D.* As where four executors be named, and two refuse, and the other two prove the will, yet all four must be named in suit against the testator's debtors, as was there admitted; but in the princical case it was

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was resolved, that the suit should be only in the name of *C.* and *D.* for that the appointment of them executors if *A.* and *B.* did refuse, did imply that then they only should be executors; and here all four were never made, nor intended to be executors, but *A.* and *B.* upon a condition subsequent, that they should not refuse, and *C.* and *D.* upon a condition precedent, *viz.* if *A.* and *B.* did refuse. It is usual to make one or more executors conditionally, that they put in security to pay legacies, or in general to perform the will; nor was it ever doubted, as I think, but that this was good: yet I should advise that such condition be plainly thus expressed, *viz.* either thus, that if *J. S.* do put in security, &c. by such a day, then he shall be executor, else not; or thus, *viz.* to make him executor conditionally, that before he do administer (funeral perhaps excepted) he shall put in such security; else perhaps, he being executor till the condition broken, in that mean time he may have disposed of all or most part of the testator's estate. In the late Queen's time there was a case remarkable to this purpose: one willed, that if his wife suffered *J. S.* to enjoy *Black-acre* (being belike part of her jointure) for three years, then she should be his executor, or else *A. B.* should; and the question was in the *Common Pleas*, whether presently, before the end of the three years, she were executor; or not till she suffered the land to be enjoyed three years; and it was held by all the judges but the lord *Anderson*, that she was presently executor, until she should disturb *J. S.* &c. For upon that done, it was agreed, that the executorship would by virtue of the condition be transferred

P. 33 El.
Alice Francis,
her case.

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transferred from the wife to *A. B.* But now during these three years might she have disposed of all the goods of her husband, yea, within one of these three years, and less time, and then have broken the condition, and have left to *A. B.* a dry executorship.

Dividedly.

29 H. 8. 3.

29 H. 8.

Dyer 4.

Hil. 23 El. in

20m. ban.

Now to the third point; One may divide his executor's power three ways, *viz.* really, locally, or temporally: really thus, he may make, *A.* his executor for his plate and household stuff; *B.* for his sheep and cattle; *C.* for his leases and estates by extent; *D.* for his debts due unto him; and so divide the power and administration of his executors at his pleasure. He may divide them or their power locally: *viz.* *A.* for his Goods in *Com. Buck.* *B.* for those in *Com. Ox.* and *C.* for those in *Com. Berks.* He may also divide them in time. *viz.* his wife or any other person to be executor during her life, or during the minority of his son, or so long as she continues widow, and after his son to be executor. So of like limitations or divisions, either for time, place or things, wherewith they shall intermeddle. Nay, doubtless one may be made executor for one particular thing only, as touching such a statute or bond, and no more; and thereof good use may be made, as I think thus; Many have bonds, statutes and recognizances, for warranty or enjoying of land, or freeing or saving harmless from incumbrances, in general or particular. Now he which hath these, selling the land, may by letter of attorney lawfully assign them to the

32 H. 8.

Bro. 115.

Vis. post. Sup.

f. 4. 126.

Bond may be forfeited or released by the obligee, notwithstanding that he has assigned it

over to another, and the legal interest therein will go to the executors of the obligee, whose names must be made use of.

party

party who buyeth land or lease: but this notwithstanding, the interest remains in him who selleth, and by his outlawry they may be forfeited, or by him released, any bond to the contrary notwithstanding; and if he die, the interest in law will be in and go to his executors, and in their names only suit or execution may be had or maintained. Quære, If not affets in law, when obtained.

Now then if the vendor, besides assignment, make as to the statute, recognizance or obligation, only the vendee executor; by this the interest after the death of the party, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quære*, if the vendee, his heirs and assigns, may be made executors, so as that security shall go to them one after another, without renewed by making of executors? Thus if the party make no other executor, he dieth intestate as to the rest of his estate; and as to this specialty only shall have an executor, and must have a will proved; and in case he doth make another will for his estate residue, there must be two wills proved. But in the other case, where by one only will one is executor for one part of the estate, and another for another, there being but one will to be proved, one proving of it sufficeth. And though in the premises of a will two be made executors jointly and equally; yet there may be a proviso that one shall not meddle during the other's life, so as they shall be executors successively, and not jointly. And thus also to other purposes aforesaid, a subsequent clause or proviso may make the partition and division

How the premises of a will may be restrained by subsequent proviso.
32 H. 8.
Bro. Exec.

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sion of authority. But if the proviso or clause subsequent be merely contrary to the premisses, it will be void: as where two were made executors with a proviso or clause that one of them should not administer his goods; this was held void for repugnancy by *Brudenel* and *Englefield*, justices. But *Fitzberbert* justice was of mind that it was not void, nor utterly repugnant: for the other might join in suits, though not administer. And justice *Shelly* was of a third opinion different from all the rest, *viz.* that here was a repugnancy, but the last clause should controul the premisses; and so this one only should be executor.

19 H. 8.
Dyer 3, 4.

Who may make an executor.

SOME persons may be unable to make wills and consequently executors, for that is all one; whosoever may make a will, may make an executor. There be nineteen several kinds of persons unable, as the *Canonists* say, to make wills; but with many of them we will not intermeddle, because we find no mention of them in our law. The persons principally and most usefully to be considered of by us are, either the defective in understanding, as infants, idiots, lunaticks, and the like; or defective in power or interest, as women covert or married, persons outlawed, attainted, convict, or excommunicate. Some touch we will give of others; as aliens, corporations, villains, monks and friers. As for infants and women covert, because much is to be said of each of them and their administration, we will forbear to treat of them

them in this place, but after will do it of each severally.

To begin with an idiot; naturally he is not able to make a will, as was resolved in the spiritual court, because he wants the use of reason to conceive what is fit for him to will; nor doth the common law oppose this, as I think.

Idiot.
3 Eliz.
Dyer 203, 204.
Shep. Touch.
402, 403, 404.
Swinb. part 2d
Lunatick.
Perk. ch. 7. sec
479.

A lunatick having *lucida intervalla*, that is, some seasons of enjoying his right mind and freedom from his lunacy, may in those times of his right mind make a will and executors, else not; for even one by age or sickness become of *non sanæ memoriæ* is unable to dispose of lands or goods.

One deaf and dumb born may make a grant, saith Mr. Perk. if he hath understanding, which is hard, as he confesseth, consequently much more a will; but in the time of King Henry 8. it is left a demurrer, whether a deed by such be good or not.

Born deaf and
dumb.
Vide plus
Perk 5, 6.
33 H. 8.
Dyer 55, 56 a.
Vide 26 E. 3. 67.
Lib. Intr. 396.
18 E. 5. 53.
Mure.
26 E. 3. 63.
So in effect
44 Aff. p. 30.
P. 31. Eliz.
Alien not enemy
Pascatia de Foun-
tain's case.

If but mute, he may wage his law, and attorn by signs, and so perhaps by signs declare his will. 44 Aff. pl. 36.

An alien may make or be an executor, so as he be not an alien enemy, for such cannot sue, as in the late Queen's time was held: but there the doubt was, whether a subject of Spain were at that time to be held an enemy, no war being proclaimed between the kingdoms, though hostilities exercised.

As for Persons attainted, convicted or outlawed, it will be said, that these can have no goods of their own, and consequently they can make no wills nor executors; and it is not to be denied, that we find it pleaded sometimes by executors, that their testators stood outlawed.

Attainted, con-
victed or out-
lawed.

But

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But first it is clear, that all and every of these may have goods as executors to others, which neither are forfeited by attainder or outlawry, nor devested by marriage or villainage. Therefore as touching them they may make testaments. And that all these sorts of persons may be executors, is also evident. So also touching Villains, monks and friers, who can have no goods to their own uses. And that one attainted of felony may have an executor, appears by the case in the late Queen's time, wherein it was long debated, whether such an executor might maintain a writ of error or not, to reverse the attainder of the testator. And as for other outlawries, the plea thereof by the executors, that their testator was and died outlawed, proves not a nullity of the will or executorship; for then they might have pleaded that they were never executors. But it tends to this, that no goods did or could come to them for satisfaction of the debts, by reason of outlawry; yet it hath been delivered, not of old only in many books, but by some of late, that debts upon contract, where the defendant may wage his law, are not forfeited by outlawry, nor uncertain damages for trespass in battery, or false imprisonment, &c. *Quære* of breach of covenant. But goods taken away by a trespasser, may yet be forfeited by the attainder or outlawry of him from whom they are taken, for that property in right still appertained to him, and he might have taken them again wheresoever he found them; therefore the action for this shall not come to his executor; but for the other not forfeited it may.

Villains, monks
and friers.

What shall not
be forfeited by
outlawry.

29 Aff. p. 63.

49 E. 3. 5.

50 Aff. p. 15.

33 H. 6. 27.

9 Eliz.

Dyer 26. 2.

contra.

Co. lib. 4. fo. 95.

19 H. 6. 47.

30 E. 3. 4.

16 E. 4. 7.

5 E. 3. 53.

6 H. 7.

Whether

Whether an excommunicated person be able to make a will or not, may be some doubt, since *Keble* denieth him ability to present to a church; and in this very point antiently the opinion of *Canonists* hath been negative, but more lately grew affirmative.

Excommunicate.
15 H. 7. f. 7.
Sum. Sylv.
tit. Testam.
Shep. Touch,
404.

Who may be executor, more.

AN excommunicate Person cannot sue, that is, proceed in suit as executor, till he be absolved, there being danger of excommunication to all that converse with him; but this makes not a nullity of his executorship, nor overthrows the suit, but stays it only from proceeding until absolution. As for persons attainted or outlawed, we have before spoken affirmatively in way of proof that they may make executors, for continuation of the executorship; so of aliens and others before. Recusants convicted at the time of the death of any testator are disabled to be his executors.

42 E. 3. 1.
1 Inst 134. a.
21 H. 6. 30.
A clerk attaint
may be an executor by pass.
Pascat. de Fountain. But an alien enemy, cannot sue as executor.
P. 31. Eliz.
3 Jac. cap. 5.

Whether corporations compound, or consisting of divers persons, may be made executors or not, I doubt. First, because they cannot be feoffees in trust to others use. Secondly, they are a body framed for a special purpose. Thirdly, they cannot come to prove a will, or at least to take an oath as others do.

Quære, if corporations compound can be executors.

What a man may give or dispose by his will.

HAVING considered of the makers of executors by *will*, and of them so made; let us now consider what by this *will* may be disposed,

C

posed,

8 Vin. Abr. 43.
pl. 23, 59. pl. 5.
11 Vin Abr.
267. pl. 6. 272.
pl. 4. 421 pl. 6.
Law of testa-
ments.
Plowd. Com.
325.

Hil. 30 Eliz.

At any time in
his life he may al-
ter the property.
So 48 E. 3. fol.
14, 15
Where the be-
quest was to one
of the execu-
tors, it was held
that the other
executor might
release it. If
sufficient, other-
wise to pay all
one as if none
48 E. 3. p. 14,
15.
11 Ed. 3.
Fitz. Tit. Cond.
9.
where both sta-
ted jointly by
one grant.
Differences be-
tween join ten-
nants and incom-
mon holding by
several grants
Another kind
of Tenants in
common.

posed, given or bequeathed. And first, he who himself is an executor cannot by his *will* give or bequeath to any other the goods, chattels, or credits he hath as executor, the property not being altered; for that he hath not them properly as his own, or to his own use; only he may make a continuation of the executorship, and his executor shall have them as executor to the first testator, as was resolved by the judges of both benches in the late Queen's time. And if he be administrator, the bequest is then also void; nor then will they go to his executor, but to a new administrator; but on his death-bed he may give them by word or deed, though not by *will*. Next, if a man have debts owing to him, as many have much, it is considerable, whether by way of bequest in his *will* he can give away these to any from his executors. And doubtless he cannot effectually in law; they being not subject to assignment unto any, except the King. So as if he give such a debt to *A.* and such to *B.* yet must the suit for them be in the name of the executor: and so also the release or acquittance for them, and not in their names to whom the bequest is. But when they be received, if there be no debts to pay, the executor ought to deliver them to the party to whom the bequest is, and thereunto may be compelled in court of conscience, or in the spiritual court. Therefore the case of the bequeathing money payable upon a Mortgage is in this manner to be understood to be good, and no otherwise, as I take it.* He that is jointly

* Co Lit. 182 Co Lit. 185. Perkins, § 500. Joint-tenants and in common, post. 177. Sup.

jointly with any other estated in lands or goods, can give no part by his *will*, but all will survive: but by act in his life he may dispose of his part; and the assignee may dispose of his moiety by *will*, yea, though it be half a horse or ox, that cannot be divided. So of a lease of lands, or tythes, or grant of goods to two, *Habendum* one moiety to the one, and the other moiety to the other; each may give his moiety by will. But if one be possessed or estated for years by lease, wardship, or extent, &c. in the right of his wife, † or have the next avoidance of a church in her right, he cannot by *will* give or bequeath any of these; but, notwithstanding, they will remain unto his wife, upon his death: but yet his gift or grant of them taking effect in his life-time would bind his wife, and carry away his interest from her. If one be tenant for the lives of one or more others, (as oft-times men take leases for lives of younger persons than themselves) this cannot be by *will* disposed of; for that it is no estate of inheritance. Therefore let the party look to convey it in his life-time, lest it go to an occupant, *viz.* him who first shall enter. If it be an estate in land, he must either make livery, have a bargain and sale enrolled, or covenant to stand seized to the use of his wife or some of his Blood, or make a lease for years determinable upon those lives. Good if it be by bargain and sale for years, if the

Co. Lit. 185.
a. b. 192,
Lit. Sect. 287.
See 1 Willson,
341.

At this day estate
pur auter vie
is deviseable by
stat. 29 Car. 2.
c. 3. sect. 12.
quod vide.

C 2

thing

† In jure uxoris, post. 178. Sup. The husband may in his life dispose of a term in trust for his wife, as well as if the legal estate was in her. 1 Vern. 7. 18. 2 Vern. 270. So if a term of years is created in trust to raise her a sum of money. Trin. 1703. between Walter and Saunders.

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thing be in lease, that so without inrolment or attornment the rent may pass: else a bargain and sale may be made for a month, or such like time, and then a release or grant of the reversion instead of livery and seisin. But if a man have a lease for ever so many years, determinable upon life or lives, that is, if such or such live so long, (which unskilful persons call a lease for lives) this state may well enough be given and disposed by *will*, because it is but a chattel. If a man be seized in fee or in tail of land having corn growing upon it, and by his will do give the corn, and die before severance, this is a good bequest; because the corn should have gone to the executor. So it is also of a person touching his glebe, and a man seized in the right of his wife, or his own right but for life. But as for trees growing upon the ground, these can no otherwise be given by *will*, than as the land itself upon which they grow may be given; of which matter, as not pertaining to the office of executors, *viz.* how and in what manner land may be given by *will*, I intend not to treat in these discourses.

Stat. Merton, &c. 2. Viduæ possunt legare tam de ritibus quam de aliis, &c. *Quære*, If the trees may be devised by the stat. of *wills*, without giving the land itself.

Of the revocation and countermand of wills, and new publication.

HAVING considered of the making of *wills* and executors, let us before we come to the probate, consider of Revocation; for *that* may take away the force of a *will* rightly made.

A will therefore having two parts, *viz.* *inception*, which is the making, and *consummation*, *Omne testamentum morte consummatur.* See the pleading of it by making a later *will*, Lib. Intra. f. 323. b. & 641. a.

which is the death of the testator or maker of the *will*, there is power in him at any time before death to revoke or alter his *will* at his pleasure. Consider we therefore of revocations, and also of new publications or re-affirmance of *wills*, in whole or in part. As therefore a *will* may be made by word, so also may a *will* made in writing be by word revoked or disannulled: for since every making of a later *will* is a countermand and suppression of the former *will*; and since a *will* may be made nuncupatively or by word, and so by making a verbal *will* one may revoke a written *will*: it will thereupon follow, that one by word may express the alteration of his mind thus far, that the *will* by him formerly made shall not stand, but be revoked and annulled; and this *will* stand and be effectual, so as if he after die, without making any new *will*, or new publication, or re-affirmance of the former, he dieth intestate or without a *will*. As a *will* may be wholly revoked, so also in part. Hereabout a good resolution was in a *Kentish* case, where one *Ryete* by his *will* in writing did give some gavel-kind land to one *Harrison*, and five days before his death said in the presence of witnesses, that this gift should not stand, and that he would alter it when he came home; desiring them to bear witness of his revocation. Now before he came home he was killed by the said *Harrison*, who caused the *will* in writing to be proved, and after he was attainted and hanged for the murder, and his son by the custom of *Kent*, (*viz.* the father to the bough, and the son to the plough) entered into the land. And this manner of revocation by word only was held sufficient although the

But how revocations now must be, vide 29 Car. 2. cap. 3.

A *will* in writing might be revoked by parol.

14 Eliz. Dyer 310. b.

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M. 28 & 29
 Eliz. Co. lib.
 4. fol. 6c.
 But for this rea-
 son in that case
 the marriage was
 a countermand.
 Vide post. Sup. 8.
 12.

7 H. 6. f. 13,
 M. 38, 39.
 Bliz.
 2 Syd. 75.
 Cro. El. 306.
 Cro. Jac. 497.
 Diversity where
 words spoke in
 the future, and
 where in the
 present tense,
 Ow. 76.
 Goult. 33.
 Cro. Car. 51.
 3 Mod. 206, 207.
 What words
 made a revoca-
 tion, Cro. Jac.
 115. not with-
 out exprefs
 words, and not
 by words only
 spoke by way of
 discourse.

will in writing was not cancelled, nor defaced. And the like resolution, for verbal revocation, is implied in the case of *Forse* and *Hembling*; where it being resolved, that a feme-covert, or married woman, by word countermanding and revoking her will formerly made, when she was a sole or unmarried woman, this was not effectual, nor of force by reason of her coverture taking away the freedom of *her will*. Hereby it is implied, that another who hath freedom of *will* may by word sufficiently revoke a *will* in writing; and so was it since also admitted in the case between Sir *Edward Montague* and *Jeofferies*, touching the *will* of Sir *Jo. Jeofferies*: but there a difference was conceived betwixt saying, *I will revoke my will* (which only expressed a purpose or intent, and therefore was no present revocation) and saying *I do revoke it*, or *it shall not stand*, or *my heir shall have my land*; which crossed the gift of it by the *will*. And as *wills* may be wholly or in part revoked; so may also the executorship of one or more of the executors, and yet the *will* may stand in all the other parts, so as there be any one executor or more unrevoked: but if all be revoked, then the whole *will* is revoked, because no *will* can stand without executors: and this revocation may be by word only, without being expressed in the *will* or any other writing. But I could wish all to express such revocation in the foot of the *will*, or that the name or names of the executor or executors so revoked be expunged or blotted out of the *will*, and that this be done in the presence of some witnesses to testify the act and intent of the testator.

Again

Again, revocations may be by act in law as well as in fact, or by direct and express terms; as in the said case of *Montague* and *Jefferies*, where land being devised by *will*, and the deviser after making a feoffment, though there were some defect in the livery to make it effectual; or if he made a bargain and sale that was never inrolled, or granted the reversion, but no attornment had, so as the land passed not, yet in all these cases the *will* or gift of land stood revoked. But in case he had only covenanted that he would have made such an estate, and not done it; this was held to be no revocation. And so by some, in case he do but make a lease, leaving the fee-simple as it was: but of this *Quere*; and if a difference may not be betwixt making a lease for years and a lease for life, which altereth the freehold. If a lease for 20 years be bequeathed to *J. S.* and after the testator maketh a lease for fifteen years, reserving a rent; I take this to be no revocation of the bequest; but if the testator, after this *will* made, take a new lease for a longer term, so as the former lease is surrendered in fact, or in law; this must needs be a revocation of the bequest, or at least an adnullation thereof; and that although the bequest were generally of his lease, not mentioning the number of years; for this which he now hath is another lease, and not *that* which he had at the time of the making of the *will*. So if one give his black gelding by *will*, and after, before his death, he selleth or giveth away that horse, and buyeth another black one; this new-gotten horse shall not pass by the *will*, because it was not the testator's at the time of making his *will*. So also if the crop

Revocation by act in law. Vide 6 E. 6. Dyer 74. & 3. & 47. x M. 42. 2. Note the statute does not extend to implied revocations. 1 Rol. Abr. 615. pl. 6 See Darley v. Darley 3 Wilson, Trin. 7 Geo. 3.

1 Rol. Abr. 615. pl. 3.

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in the barn be bequeathed in *October*, and the party lives till that time twelve months, having sold that crop, and innewed a new, this later crop shall not pass by the will, and the former cannot.

Again, as revocation may be by alteration of the estate of the devisor in the land devised; so may it also be by alteration in some case, of the state or quality of the person of the devisor. As if a woman sole make a *will*, and after take a husband, this, without any more, as is resolved in the said case of *Forse* and *Hembling*, doth work a revocation or adnulation of the *will*; for that else it should be then irrevocable, since she having lost the freedom of her will, cannot actually and directly make a revocation as we before have shewed. But notwithstanding her *will* be revoked, yet in case her husband before or after marriage with her were bound or covenanted to perform this woman's *will* if he so do not, by payment of the legacies therein bequeathed, his bond or covenant will stand good and be suable against him: as was adjudged touching the *will* of *Elizabeth Smaleman*, married after her *will* made to one *Wood*, who first was bound to perform it. Yet another case there is of alteration in the state of the testator's person which makes no revocation of his *will*; as if he being of sound mind and ability make a *will*, and after becometh frantick. In this case this is no revocation; so as his *will* stands till his death irrevocable, if he recover not. Now of a *will* revoked there may be a reviver by a new publication; and thereof now.

Cro. El. 27.
Cro. Car. 219,
376, 597. Tho'
it is no *will* nor
ought to be
proved, but an
appointment
which he is
bound to per-
form.

Of new publications.

HAVING shewed how a *will* may be revoked, and so lose its force; let us now see how without making a new *will*, that so revoked may be revived and set on foot again. And that is divers ways. As, first by a *Codicil* annexed after thereunto; as was resolved between *Betford* and *Barnecot* in the king's bench. Secondly, by adding any thing to the *will*, or making a new executor. Thirdly, by express speech or word that it should stand, or be his *will*: as I conceive to have been the better opinion in the said case of *Montague* and *Jeofferies*, wherein yet was much difference of opinion, both touching revocation, and new publication. If a Man having made a former *will*, do make a later, which is more than a bare revocation; yet if afterward, lying upon his death-bed and speechless, both these *wills* be delivered into his hand, and he required to deliver to one of his friends about him *that will* which he would have to stand, and to keep in his hand the other, and he thereupon delivereth to the Minister, or other his neighbours, the first made *will*, retaining in his hand the later, as was done in the time of *Edward* the third; here the former *will*, though made void many years before by the later, is revived, and shall stand as the party's *will*. But now put the case that a bequest at the first is void; yet by publication after it may be good: as if one give to *Sarah* his wife a piece of plate, or other thing, and hath no such wife at the time, but after marieth one of that name, and then publisheth his *will*

In the case of *Beckford* and *Parnecot*, according to *Cro. El.* 493. It was adjudged a new publication on words spoken by the Testator, and not by annexing the *Codicil*; for whether that would have been so, three judges doubted against one.

44 Aff. p. 36.

44 Ed. 3. f. 33.

Co. Lit. 111.
 Co. Ent. 124,
 327, 515.
 Flow. 343.
 Salk. 237, 238.
 11 Mod. 123.
 Holt's Rep.
 240, 244. 747.
 Fitzgib, 240.
 Swinb. 88.
 Gilb. Law of
 Wills 11, 124,
 146.
 2 Bac. Abr. 49.
 Eq. Abr. 172.
 Via. Abr. 54.
 pl. 5.
 3 & 4 P. &
 M. Dy. 48.

Executors re-
 vable by a *Stat.*

By words.

His name must
 be discernable in
 the will.

will again: now this shall be a good bequest. So if one devise lands or goods which one hath not; if he after do purchase the same, and then say, that his *will* before made shall stand, or be his *will*, it shall be a good *will* and bequest; for this in effect is a new making. And though most of the precedent cases be of revocation of particular parts of the *will*, and not of the total; yet first, be it considered, that *that* part so revoked was in effect, the substance of the *will*; next, it is easily discerned, that if one part be revokable, so is another also. And thus revocation may spread itself over the whole: nay, doubtless the whole *uno flatu* may be revoked, as well as by parts. And as the *Velocities* or disposing parts of the will are revocable and revivable by new publication, as afore-said; so is also the constitution of executors. As if one of the executors names be stricken out, and afterwards a *Stat* be written over his head by the testator or by his appointment, now is he a revived executor. So if the testator express by word, in the presence of witnesses, that the party put out shall yet be executor. But now I mean where the executor's name is not so blotted out but that it may be read and discerned; for else the *Stat* is upon nothing: and if the verbal re-affirmance should renew his executorship, then must the *will* be partly in writing and partly nuncupative, his name not being to be found in the written *will*.



But great alterations being made in these cases by stat. 29 *Car. 2. ch. 3.* the directions of that stat. must be observed.

C H A P. II.

Of the state of things instantly upon the testator's death, before any will be proved.

Here we will consider these several things ;

1. *What is wrought by a gift of a thing certain and known ; as the white horse the red cow, &c.*
2. *What by a bequest to an executor.*
3. *What is wrought by a release in the will to a debtor.*
4. *What by making a debtor or creditor an executor,*

AS touching the first, viz. the bequest of a chattel, real or personal, which the testator had in possession : notwithstanding that if the said testator had by his deed or writing, or but by word on his death bed, or before given these his goods, and died before they had been taken, he to whom they so were given might have taken them ; yet in this case of gift by will, neither can the legatee, viz. he to whom they are bequeathed, either take them or recover them from the executor, or a stranger take them by any suit at law for that he hath no property in them ; yea, if the bequest be to himself who is made executor, be it of a lease, plate, chattel, &c. they shall not vest nor settle in him as legatee, but as executor, until express or implied election ; but he is to

Co. Lit. 111.
 Keil. Rep. 128.
 Dyer 254.
 Swinb. 24.
 11 H. 4. 84.
 All 39.
 Stil. 54. 73.
 Br. devise.
 11
 March 137.
 39 El. B. R.
 P. 11. J. 13.
 March 96.
 1 & 2 P. &
 M. D. 110.
 a. and 139. b;
 Vide Co. 8. f.
 95 & 96.
 On the second,
 see Co. 10 f.
 47.
 So resolved
 Pasc. Tr. 37.
 El. in B. R. only
 Gow. contra,
 assent of one ex-

Portman El. & Sim. Def. See more of this tit. Legacy ; and of the executor only.

have

Why executors
assent necessary
to the legacy,
vide post. Sup.
pl. 11.

27 H. 6. 8.

Of late, perhaps,
some single or
sudden opinions
may also have
run that way :
but in Portman's
case the point
was divers times
argued, and
then adjudged as
before, To be
bought.

have and take the same by way of legacy. And the reason in both cases is this, *viz.* that the law prefers debts and the satisfaction of them before legacies and ties executors also to that rule; and therefore will transfer nothing from or out of the executor, till he having considered of the state of the debts to be paid, and goods out of which the same are to be paid, shall find that safely this or that legacy may take effect without making any defect in payment of debts, or drawing upon him and his own goods any damage or loss, as a waster, and thereupon shall assent to such legacy. Thus now is the law taken; but heretofore some opinion hath run otherwise, *viz.* that he to whom any bequest was made of a thing known and certain, might take it without any assent of the executor; and that when to the executor himself any goods or chattels, movable or immovable, were bequeathed, in case there were otherwise sufficient goods for satisfaction of debts, the same should instantly upon the testator's death, without any act or election by the executor, be transferred into and under him in his own right as a legacy, and not remain in him as executor. As for sums of money bequeathed, or so much in plate or rings, it is evident, that they must be had by the delivery of the executor: yet hath the legatee such an interest before delivery, as that, dying before payment, it will go to his executors. But, as I take it no such person, to whom any thing certain is given by *will*, can make any gift or grant of it before the executor have assented to his having thereof: nor, perhaps will the executor's assent after the grant have such relation as to
make

make good the grant precedent; why so, yet, more than an attornment of a lessee, which is a like assent to the grant of another? and *Quær.* if by the outlawry of the legatee before the Executor's assent this thing bequeathed be forfeited.

* If without just cause an executor will refuse to assent, he is compellable by law spiritual, or court of conscience; yet if the spiritual court pres to do, where is just cause to stay, a *Prohibit.* lieth, *ut credo*; for since executors stand liable to recovery of debts against them by common law, it is reason that law enable them to keep wherewith to pay. And here yet note some seeming opposition of the law: for where before great difference was shewed between a devise or bequest, and a gift or alienation executed in one's life-time; yet the Lord *Dyer* reports it to be resolved, that where a lease for years was made upon condition that the lessee should not alien in his life-time, yet a bequest of this lease by his *will* was a breach of the condition, as being an alienation in his life-time.

Quær. Of this; see more after, tit. legacy thereabout.

2. Of discharge by *will* to a debtor, some question may be, whether to perfect and make good this, so as the debtor may plead it in bar, there be not requisite, as in the former, an assent of the executor? On the one side since this giving is a forgiving, for he to whom it's bequeathed cannot otherwise have it than by way of retainer; it may probably be said, that here
needs

* A legacy is not recoverable at common law, but in the ecclesiastical court, chancery, or exchequer.

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needs no such assent of the executors, as in the case where any thing is to be transferred; for here is rather an extinguishment and an exoneration, than a passage of a chattel by way of donation. On the other side, it is probable that it being but a bequest, and so a legacy, since debts are in law and conscience to be satisfied before any legacies; therefore the executor having not sufficient otherwise to satisfy his testator's debt, may sue for this debt, and refuse to suffer it to pass away as a legacy. And to this opinion do I incline, as best for creditors; and satisfaction of debts is by law respected as an act greatly concerning the testator's soul. But some will perhaps, make a contrary doubt, that although there be an assent of the executors to this discharge, yet it will not amount to a legal release; for that a debt, at least if it be by specialty, cannot be released but by deed, and a *will* is no deed; for a seal is not necessary thereunto, though it be fit and convenient. Whereto I give this answer, that a *will* though it be not properly and legally a deed, for it may be good enough without seal, which is an essential part of a deed; yet hath it the force and effect of a deed: for as a release cannot be made but by deed; so neither can an estate or interest, though but for years, in tythes, advowsons, commons, fairs, and like things be granted or assigned otherwise than by deed yet it is clear that such an estate for years in any of these may be given by *will*, as well as a lease of Land; which proves a *will* to have the force and effect of a deed.

Unumquodque
dissolvitur eo
modo quo li-
gatur.

Being things
that lie in grant.

Of making a debtor or creditor executor: and first of the debtor made executor.

Suppose we then that *A.* and *B.* being made executors, the testator was indebted to *A.* twenty pounds, and *B.* was indebted to the testator twenty pounds, how do things stand presently upon death? First, it is clear that the debt of *B.* to the testator stands in law extinct; this making of him executor being a release in law.

21 H. 7. 31.
Plow. Com.
185. contr.
Danby & Choke.
8 E. 4. 3.
And may be granted, that he should account before the ordinary for it.

Therefore let creditors take heed of making their debtors executors. And yet doubtless (methinks) such a debtor made executor should hold himself restrained in conscience from taking benefit thereof, if (the debt remitted) there shall want to satisfy either debt or legacy of the testator. And I doubt whether a court of conscience may not justly so order, the testator being perhaps ignorant of this point in law, that this debt should be released by making the debtor executor.

Yet it seems Plowd. 86. a. the law was taken to be at supra. 8 E. 4.

And what is spoken of making the debtor executor, generally the same is to be understood of making any one of the debtors executors, where there be many joint-debtors: and so where may executors be made, and but one of them is debtor to the testator; for they cannot sue without making him who is the debtor also a plaintiff, which he cannot be against himself. The like law touching action of trespass or account. Yet of old, where one made his bailiff one of his executors together with *A.* and *B.* who brought an action of account against the bailiff in their two names only, justice *Herle* held the action well brought. This was in the begining

Though he never administer.
21 E. 4. 3. 81.
11 H. 6. 38.

2 R. 3. 20.
per Starkey, & 22. per Vavasor
9 H. 5. 13.
left a demurrer in trespass by all, against the executor, who was trespasser,

3 Ed. 3. 23.

6 H. 4. 3.

8 Ed. 4. 5.
Cook.

21 H. 7. 31.

20 E. 4. 17.

21 E. 4. 3. 61.

Plowd. Com. 36.

Plowd. Com.

185.

11 H. 4. fol. 83,

84.

31 E. 3. Fitz.

Ex. 72.

beginning of King *Edward* the third his time; but the contrary hath been since resolved. Some also have held, that though in the life of this executor who was a debtor he could not be sued; yet after his death, the surviving executors might sue his executor. But that cannot be, as I take it, for that debt was utterly extinct by the making of him executor, as if the testator had released it to him; yea, though his executor died before he did ever administer or prove the *will*. And like extinguishment of the debt, if the creditor marry with one of the executors of the debtor: yet was there an action of debt maintained *temp. Ed. 3.* by the husband and wife against the husband and other executors, upon an obligation by the testator to the wife before her marriage. But if a debtor take administration of the goods of his creditor, this, methinks, should not discharge him, but this his debt should stand as *Assets* in his hand, because the intestate did no act to free him from the debt.

The debtee, or creditor made executor.

Plowd. Com.
158. By all the judges but Brook chief justice, Plow. 185. b. where the goods be of more value of which shall be so altered.

See Plow Com. 544. the like of a legacy of 20 l. given to the executor.

THIS making of the debtee executor, and so the party who both should pay and be paid the debt, giveth him clearly power to pay himself before any other, if his debt be by specialty, or upon record. Nay, some have held, that so much of the goods of the testator shall be altered in property out of the executor as executor, into him as creditor; but how that can be I cannot see: for whether it shall be satisfied out of the leases and chattels, real or personal, whether out of the corn in the barns, cattle in the

the fields, plate, or household-stuff, this, till some election made by this debtee executor, cannot be known, nor shall be effected by any operation of law preventing the executor's election in taking his satisfaction where and how he will. For certainly, as an executor hath election to pay which creditor he will first, so hath he election to pay and satisfy himself by what part of the testator's goods he will; yet, perhaps, if there be ready money in the executor's hands, there shall be an alteration of the property of so much thereof as was owing by the testator come not to the executor. And if there come not to the hands of such executor sufficient to pay himself, he may have an action of debt against the other executors, or the heir, as by some hath been conceived: yet let it be well advised of, whether, if he do administer at all, and especially if he pay himself any part, he have not thereby barred or disabled his suit for the residue. But if he refuse to administer at all, it were very unreasonable that he should not be able to sue the other executors: for so a debtor might by subtilty make his creditor an executor with others, and take a course that his goods should come only into the hands of those others, so as the creditor could not pay himself; and consequently, if he could not sue the other executors, he should thus be stripped of his debt by a slight. *Quere*, if he may bring the action in the name of the other executors only, the *will* being proved in his name as well as in the names of the rest; or whether the action shall not be brought in his name also, and then he be severed at his own prayer. But against the heir there is none to

Or if the goods amount in all to no more than this debt.

See Plow. Com. 158.
13 H. 8. 15.
11 H. 4. 83.
12 H. 4. 21.
20 E. 4. 17.
21 Ed. 4. 3.

Plow. 184. b. & 185. b. He is barred; for he cannot proportion h.s. debt.

The Office of an Executor.

12 H. 4. 27.
He may sue the
heir if the heir.
be bound, and
he hath not suf-
ficient goods as
executor.

join with him : and he may sue, if he have not administred as executor ; this admitted, that the bond extend to the heir, which without exprefs words it doth not, though for the executor it be otherwise. †

Thus having considered of the state of things before and without any *will* proved, or other act done by executors ; we should now come to the point of the proof : but two things pertinent to it are in order precedent.

C H A P. III.

1. *What may be done by or to an executor before proving of the will.* 2. *Of refusal, and the Things incident thereunto.*

Before probate what may be done by or to executors.

AS to this, it is clear, that before proving of a *will* by the executor he may seize and take into his hands any of the goods of the testator ; (yea, enter into the house of the heir if not locked) so to do, and to take the specialties of debts ; and generally he may do all things which to the Office of an executor pertain, (except only bringing of actions and prosecution

Vide post. Sup.
p. 41, 75.

May release before probate.
Co. Lit. 292.

* If the heir is not expressly bound in the bond of his ancestor, he is not bound at all. 2 Saund. 136: But the executor is bound by his testator's covenant though not named therein. Dyer 14 & 305. Vide post. Sup. 235.

secution of suits.) He may pay debts, receive debts, make acquittances and releases of debts due to the testator, and take releases or acquittances of debts owing by the testator: yea, if before such proving the day occur for payment upon bond made by or to the testator, payment must be made to or by this executor, though no will be proved, upon like pain of forfeiture as if the *will* were proved. Also an executor my before probate sell or give away any of the goods or chattels of the testator. And whereas the assent of an executor is necessary to the settling an execution of a legacy, as before had been shewed; so as if one give me his white horse, or black cow by *will*, or any other well known thing, I cannot after his death take it, though I come where it is, but am punishable by action of trespass at the executor's suit, if he do not assent; yet an executor before the *will* proved may give his assent, and it will stand good. Yea, although he die after any of these acts done, the *will* being never proved by him; yet do these acts so done stand firm and good as I take it. Yet (as I find) an executor making his *will*, and dying before he hath proved the *will* of his testator, his executor may not prove both the *wills*, and so become executor to both the testators. But in case the goods were, after debts paid, bequeathed to the executor, his executor may take administration of the first testator's goods with the *will* annexed; as by Dr. *Drury* was in the late Queen's time declared to be the law and course of the court spiritual; to which credit was given by the judges of our law and the court of *Star-chamber*: for though the Book

9 E. 4. f. 33.
47. 7 H. 4.
18. They cannot sue till they have the will under the seal of the ordinary.

Wray 23 El.

Keilw. Rep. 128.
Dyer 254.

22 & 23 El.
Dy. 372.

For here he need
not name himself
executor.

Dy. in l. low.

Com. 281.

Case of Greys-
brook and Fox.

doth not mention it to have been in the *Star-chamber*, it is elsewhere so reported. Yea, an executor for goods of the testator taken from him, or a trespass done upon the lease-land, or a distraining or impounding of goods or cattle, may maintain, before the *will* be proved, actions of trespass or replevin, or detinue; for these actions arise upon the executor's own possession.

He must shew
the probate upon
declaring.

But before the proving of a *will*, an executor cannot maintain a suit or action of debt, or the like. And the reason is, for that therein he must shew forth the *will* proved under the seal of the ordinary. And so as I take it, must it be, if he bring any action for trespass done or goods taken in the testator's life-time; so as the testator himself was intitled to the action, and it grows not upon the executor's possession.

34 P. & M.

Dy. 135. a.

Dy. in l. low.

Com. 281. a.

I find that an executor granting the next avoidance of a church which to him came from the testator, the grantee maintained a *Quare Impedit*, without shewing forth the *will*: but the executor himself might so have done as of his own possession before the *will* proved, and so, without shewing it under the seal of the spiritual court as well as actions of trespass or replevin, for goods taken after the death of the testator: yet in the principal case of *Greysbrook* and *Fox*, which was an action of detinue by the executor for goods taken or detained after the testator's death, the plaintiff did shew forth the *will* proved. But that proves not any necessity thereof; or that, if the *will* had not been proved, it could be no hurt to shew it forth. So upon his own contract for the testator's goods: as if the executor sell cattle or other goods of the testator before the *will* proved, he may for the money

Flow. Com.

27. b.

ney payable maintain an action for debt before he have proved any *will*: and in this, and the action of trespass, there is no necessity of naming him executor. Also, on the other side, an executor may well enough be sued for debts of the testator before the *will* be proved; for he may not by his own act of delaying the probate of the *will* keep off suits, except he will refuse in due manner, that so administration being granted, there may be some body suable by the testator's creditors for debts by him owing. And the usual plea of the defendant, to estrange himself from the testament, is to say, that he neither is executor, nor hath administrated as executor, so as if he either be executor *de jure*, or *de facto*, by his own act of administering, it sufficeth.

So in trover for goods taken after testator's death, and the same I suppose in trover for goods taken in testator's lifetime, if the executor has made a demand. Qu.

Of refusal to prove the will, and therein of administration, fore-cluding refusal.

NOW as touching the other point fit to be thought of before we meddle with the probate, *viz.* Refusal to prove; we will thereabout consider these several parts *viz.* First, how and in what manner refusal may or must be. 2. In what cases or in respect of what acts one named executor hath lost or determined his election of refusal or acceptance. 3. Of what effect and operation the refusal is; what difference where all the executors refuse, and where but some or one of them. Fourthly, what relation it hath.

Now touching the first: the ordinary before committing administration, where a *will* is made and executors named, if he know of it, must

3 H. 7. 11.
9 Ed. 4. 47.
3 Hen. 7. 14.
Plow. Com. 281

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send out process against the executors to come in and prove it: and if they do not come, they are to be excommunicate; but if they do come, if they, nor any of them, will prove it, by reason of such refusal the ordinary may commit administration; perhaps also they may be appointed executors at a time future, and not presently. Now refusal cannot be verbally or by word, but it must be by some act entered or recorded in the spiritual court, and therefore must be done before some judge spiritual, and not before neighbours in the country; for that is not effectual. Yet Sir *Ralph Rowlet* making the lord keeper *Bacon*, *Catlin* chief justice, and the master of the rolls, executors; they wrote a letter to the ordinary, that they could not attend the executorship, and therefore wished him to commit administration; who did so, making every of their refusals to be recorded: and this was held good. So as a lease being by that will bequeathed to *Catlin*, and he, after this refusal, entring and assigning it to one, and the administrator assigning it to another; it came in question between them whether had best right; and judgment was given for the assignee of the administrator against *Catlin's* assignee: whereas if the refusal had been void, *Catlin* had continued executor, and so his title had been better. In case the ordinary himself be made executor, there (saith the book) he may refuse before his commissary: and so was it there pleaded for the archbishop of *Canterbury*, who was made executor to Sir *Will. Oldballe*.

9 Ed. 4. 33.
See Pl. 184. a.
If debtee made
executor sue the
ordinary for the
debt this amounts
to a refusal of the
executorship.
M. 2. 29.
Eliz. inter
Brooker &
Carter in Ba.
Com. Vide post
Sup. 74a

9 Ed. 4. 33.
The book calls
him cardinal of
Canterbury.

What

What shall be such a meddling or administering by an executor, that he cannot refuse after.

AS to the second, where an executor hath administred, he cannot afterwards refuse, because he hath already accepted of the executorship, and so determined his election: at least the ordinary ought not to accept of such refusal, but should compel him to take upon him the executorship, as the law was taken both in the time of *Ed. 4.* and *Queen Elizabeth.* Yet if the ordinary do admit one to refuse, notwithstanding that he hath administred, this standeth good, as it seemeth conceived by the judges in the time of *H. 6.* For there the executor commanded one to take the goods of the testator out of the hands of *J. S.* who did accordingly, and afterward the executor refused before the ordinary, and administration was committed to the said *J. S.* who brought an action of trespass against the party so taking the goods from him; and there the refusal and committing administration were admitted to be good: so perhaps *Factum valet quod fieri non debuit.* And it well may be that the ordinary did not know of the executor's such intermeddling at the time when he did admit his refusal. After refusal, and administration committed, the executor cannot go back to prove the *will*, and assume the executorship: but if only upon the executor's making default to come in upon process to prove the *will*, the administration be committed; here the executor may yet at any time after come and prove the *will*, and so undo the administration; as was in the late Queen's time resolved between *Bale* and *Baxter.*

Vide post. Sup. p. 143.

9 Ed. 4. 47.
Selling land as executor is administration, Dyer in case of Greybrook and Fox. Pl. Com 280. b. Pas. 7 Eliz. 36 Hen. 6. f. 7, 8.

Mich. 27 & 28 Eliz.

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But what if after refusal it shall appear to the ordinary, that the executor hath administered before his refusal, so as had it been then known, the ordinary should not have admitted him to refuse? Whether now may he revoke his administration, (for it is revokable) and enforce the executor to proceed to proving of the *will*?

Boxel's case in
Com. Ban.

A being executor did administer, and yet would not prove the *will*. B. took administration; and being sued for debt, did plead the matter *supra*, and it was held a good plea; and it was found for him before Just. Doddridge ad Ox. in a statute Carol Reg.

What shall be said an administration.

32 H. 6. 7.

20 Ed. 4. 17.
& 21 E. 4. 5.

And surely, methinks he may; for that the executor by administering hath determined his election, and accepted the office of executorship: now he cannot both accept and refuse. Besides, we know that creditors may maintain their suits against him having once administered; the common plea to free himself, and to shew that he is not the party suable for the testator's debt, being that he neither is executor, nor ever did administer as executor; wherefore he having administered, it will be found against him. Now it is not congruous that in the spiritual court there should be no executor, and yet in the courts of *Westminster* there should be an executor. But since this point of administering is so material to the point of being admitted or not admitted to refuse, we will here consider in this place briefly what shall be said to be an administration by an executor determining his election, and disabling his refusal, and what not.

1. Some will perhaps conceive, that the act of the executor in the fore-mentioned case, where he only commanded *J. S.* to take goods of the testator's out of a stranger's hands, was no administration; and it is true that in that book it is passed in silence, and not expressly said to be an administration. But the Lord *Dyer* in the case of *Greysbrook* and *Fox*, speaking of that case, saith expressly, that the ordinary might there have

have rejected the executor's refusal; for, saith he, when the executor had once intermeddled, he should not have been suffered to refuse: so as he doth clearly admit *that* to have been an administration. And elsewhere it is held, that if an executor takes goods of the testator, and converts them to his own use, this is an administration; yea, if he do but take them into his hands, say some, without converting of them.

If the wife takes more apparel of her own than is necessary, this is an administration as the book admits; but if by the assent or delivery of the executor, it is not. More clearly, if one do either pay debts of the testator, or receive debts, or make acquittances for them, or demand the testator's debts as executor, or give away goods which were the testator's, or deliver money of the testator's for fees about proving the *will*; all these be full and clear administrations as executor. But, saith *Fitz-herbert*, if he only lay out his own money for fees, this is no administration; so saith *Frowick*, if he pay debts with his own money, and if he do it about the funerals. But some difference may be between acts done by one named executor and by a stranger, *viz.* to make him an executor of his own wrong; whereof we shall speak after, not in this place. If one being sued as executor take it upon him, and plead in bar as an executor; this is an administration.

21 Ed. 4. 5.
21 H. 6. 9, 20.
33 H. 6. 3. 1. 8.
1 El. Dy. 166.
13 Ed. 3.
Exec. 91. 3.
4 Ma. Dy. 135.
26 H. 8. 7, 8.
20 H. 7.
Kelw. 63.
21 Ed. 4. 5.
20 H. 7. f. 5. 2.

9 Ed. 2. 13, 14.
33 H. 6. 31. 2.

Of the force and effect of refusal.

AS to the third point, *viz.* the force or effect of refusal; first it is clear that if there be but one executor, and he do refuse, or being many,

Vide post. p. 39.
& 51 in the Sup.

Cook 1. 5. 28.
Cont. 18. E. 3.
Bro. 8. 7.

22 Ed. 3. 19.
15 Ed. 3.
Exec. 8.
41 Ed. 3. f. 22.
21 Ed. 4. f. 24.

42 El. Co. 9.
f. 26, 27.
4 & 5 Ph.
& Ma. Dyer
169. c. 6.
Contra 21
E. 4. 23, 24.

many, if they do all refuse, then is the party dead intestate, and administration is to be committed with the *will* annexed, as is before said, nor can any after meddle as executors. But in case there be divers executors, *viz.* *A. B.* and *C.* and *A.* only refuseth, and the *will* is proved by the others, there *A.* continueth executor notwithstanding his refusal; so as he still may release debts of the testator, and debts owing by the testator may be released to him; yea, if suit be to be had by or against the executors, it shall not be in the name of *B.* and *C.* only, but *A.* also must be named as a plaintiff or defendant, else the action may be overthrown. For the *will* being proved, all the executors therein named stand and continue executors, notwithstanding any of their refusals; as it was resolved in the latter end of the late Queen's time, according to divers former resolutions. And therefore this executor which hath refused may afterwards administer at his pleasure, and intermeddle with the goods as well as the others; yet, saith *Brook*, Chief Justice, after the death of his companions he cannot so do; but then the executor of him who proved, is only to administer. *Quod non est lex.* There may be some difference between suits by executors, and suits against executors: for when they themselves sue, they being privy to the *will*, and having the custody of it, must bring their action in the name of all the executors according to the *will*; but he that is to bring an action against them need not perhaps take notice of more executors than those that have proved the *will*, or otherwise do administer; for it is no good plea for themselves in an action against them to say, there is another
ex-

executor, without saying also that he hath administered, as it seemeth by divers books. Nay, Swinb. 395 one book in the time of *Henry 8.* goeth farther, *viz.* That if the suit be brought against all, yet one of them not intermeddling with the proving of the *will* may plead that he was never executor, nor administered as executor. By this it should seem that executors refusing (I mean all of them, so as no *will* is proved) they in an action against them may say that they were never executors: but methinks, they should not so plead, but shew the special matter, as was done in the time of *Edward* the fourth. 33 H. 6. 38. a. Co. 9. 37. b. 32 H. 6. 25. 27 H. 8. 11. per totam curiam.

As for relation I will forbear to speak, till I come to proving; for that probate and refusal stand in the same state as touching relation.

C H A P. IV.

Of proving wills.

NOW let us see touching the probate of Vide post. Sup. P. 23. *wills* what is considerable; and therein of these three or four parts:

1. *Where, and before whom, and how the proof must be.*
2. *What shall be bona notabilia, to intitle to probate.*
3. *What force or validity either a right or erroneous probate hath.*
4. *What relation either probate or refusal hath.*

As touching the first point, *viz.* How, and where, and before whom *wills* are to be proved, briefly thus:

The

Wills proved in
some manors by
prescription.
2 R. 3. Fitz.
Co. lib. 9. f. 43.

The proving is in the spiritual court: yet in some manors, by prescription, *wills* are to be proved before the steward, though no lands thereby pass, as appears by divers books: and in the manor of *Mansfield* is this prescription; and in others, whereof *Tremaile* was steward in King *Richard* the third his time, as he declared. And the like I may tell of my own knowledge touching the manors of *Cowley* and *Caversham* in the county of *Oxford*, where I have kept the courts of the Lord Viscount *Wallingford*, and found it in present and frequent use. And it is said by the judges in the time of King *H. 7.* That this proving of *wills* in the court spiritual is not antient, but of later time. Yea, it is acknowledged by *Linwood*, the dean of the arches, that it pertains not to the spiritual court of common right; nor is so in use in other kingdoms. The reason why the law of *England* hath herein given way to the ordinary and court spiritual, is said by *Walsb.* in *Greysbrook* and *Fox's* case, to be the piety and integrity which is presumed to be in those of that function, having charge of souls. Indeed they are, as it seems to me, executors of the new testament, or last *will* and testament of *Jesus Christ*, whereby great legacies and gifts are given to men, and by pastors to be dispensed and distributed: of which distributors it is required, as *St. Paul* saith, *That they be found faithful.* And happy are they who with him can plead *Plene Administravit*, viz. that they have fully administered, as he did; much depending thereupon, viz. God's honour, the blessing, prosperity, and safety of the country, the piety, justice, conscience, contentation and salvation of men. As for

11 H. 7. 12.

Why this jurisdiction given to
court spiritual.

Plow. Com.
279.

1 Cor. 4. 2.
Act. 20. 27.

for *wills* proved in *London* and *Oxford* before the mayor, that is only in respect of the bur-
gages within those places devisable; but they
were to be proved also before the ordinaries in
respect of the goods, and there only where no
lands are bequeathed. The proving then is to
be before the ordinary, general, particular or
special. By general, I mean the metropolitan
or archbishop, before whom it is to be proved;
in case the testator have goods valuable, called
bona notabilia, in divers diocesses whereof he is
superior.

Proved in Lon-
don and Oxford,
before the mayor.
Vide plea in the
Sup. p. 10, 15.

Vide f. proxim.
Of Bona Nota-
bilia both in
Canterbury and
York.

Of bona notabilia.

WHAT shall be said to be *bona notabilia* is
considerable; for thereabout hath been
much diversity of opinion: some holding that
they must be of forty shillings value, some five
pounds, some ten pounds; yea, some that the
value of a penny sufficeth to draw it to the arch-
bishop from the particular bishop. But that
difference of opinion I conceive to be now clear-
ed by a canon made in the first year of King
Charles his reign at a convocation then held,
whereby it is established, that five pounds shall
be the sum or value of *bona notabilia*; yet
therein is this *Proviso*, that where by composi-
tion or custom in any diocesses *bona notabilia* are
rated at any greater sum, the same shall conti-
nue not altered. It is likewise thereby provi-
ded, that if any man die *in itinere*, viz. in his
journey or travel, the goods which he then hath
about him shall not cause that administration
shall be committed, or the *will* proved, before
the metropolitan.

Can. 92, 93.

In the Diocese of
London, it is
10 l. by composi-
tion.
Swinb. 414.
Vide post. Sup.
p. 11.
Canon law made
1 Jac. c. 9.
Vide post. Sup.
p. 27.

Having

Swinb. 418.

Having considered of the value, now another point observable is, what things shall be said to be *bona notabilia*. And as to *that*, debts owing to the testator are *bona notabilia*, as well as goods in possession, their value being answerable: yet, I think if the penal sum of the bond be but five pound for payment of a less sum, although the bond be forfeited, yet in the spiritual court, where respect to conscience suppresseth the favouring of executors, this will not be taken to be *bona notabilia*, viz. of five pounds value, although in law the whole penal sum be a duty. But if the debt be five pounds or more, though it be desperate, or due from the King, against whom no suit can be, but only by petition, yet this will stand for, and as *bona notabilia*, as I take it, in the court spiritual; though thereabout I can but conjecture, since the rules of our law determine it not. And this point, touching the King's being debtor, I find debated in the late Queen's time, but not resolved, so far as I find. But there *Popham* at the bar urged that no debt should be *bona notabilia*; and if it should, yet not such for which no remedy by suit, as in that case, the Queen being debtor. Yet a farther question local is touching these debts or things in action, in what place or diocess they shall be said to be as *bona notabilia*, viz. whether in the place where the debtors be, or where the obligations, or other specialties be? And as to this, the law hath been taken, that because the persons of the debtors be moveable, passant and transitory; therefore these debts shall be said to be, and to make *bona notabilia* where the bonds or other specialties be, and not where the debtors inhabit and dwell. And so was it
not

21 Eliz.

Goods considerable or conspicuous.

Bona Notabilia where the Specialties be.

The Office of an Executor.

47

not long since conceived by Justice *Walmfley*, and Justice *Beaumont* in one *Pretyman's* case, no other contradicting it. Herein therefore many are mistaken, who only in respect that the persons of the debtors do dwell in foreign dioceses, other than the places of the death of the testator, or where his other goods were, do take administration in the prerogative court, though the specialties remained where the party died, or his goods residue were. But in case the debts be only by contract, without specialty, then indeed they are to be esteemed *Bona Notabilia*, there and in that place where the debtor is, as the said judges well conceived the difference. But in case land be given to executors for payment of debts or legacies, this shall not be *Bona Notabilia*, as I take it, though it be *Assets*.

Hil. 17 Eliz.
M. Com. Da.
Vide 13 & 14 E.
Dy. 305.

Bona Notabilia
where the debtor
is.

Of the validity and invalidity of probates.

AS to the third point, we will first see of what validity an erroneous proof is, and thereabout we shall find this difference. Admitting that one hath not *Bona Notabilia* in divers dioceses, so as of right the proving of the will appertaineth not to the metropolitan, and yet the will is proved before him; this is not merely void, but stands in force till it be reversed by some sentence upon appeal; as was resolved between *Vear* and *Jeofferies*, in the late Queen's time. But on the other side, in case one have *Bona Notabilia* in divers dioceses, or a peculiar and a diocese, and yet the will is proved before the particular bishop within whose diocese part of the goods are; this is merely

Not void, but voidable, for that the metropolitan hath jurisdiction over all the dioceses within his province, and for that cause it can't be void, but only voidable by sentence.
Vide post. Sup. p. 27. 118.

22 Eliz.
Because by no means he can have jurisdiction of that cause which belongeth to his superior.

Where one hath
Bona Notabilia
in both the pro-
vinces of Can-
terbury and
York, how
proof to be.

Vide post. Sup.
51, 153.

and utterly void, without any reversal. So also of proving in some peculiar. And in case one have *Bona Notabilia* both in the diocese of *Canterbury*, and in the diocese of *York*; the *will* must be proved either before both metropolitans, if within each of their jurisdictions there be *Bona Notabilia*, in divers dioceses; or else, as I take it, if there be not so in any of the places, then before the particular bishops in those several dioceses where the goods are. Or, if within the one jurisdiction metropolitan the testator had goods in divers dioceses, and in the other but in one diocese; then in the one place is the *will* to be proved before the archbishop, and in the other place before the particular bishop, as I conceive. And so also of peculiar jurisdictions. And in some places archdeacons have peculiar, or jurisdiction ordinary, and power to take probates of *wills*, and grant administrations. But where any like error or misproving is in these respects, it is cause of reversal or of nullity, according to the former difference: so also if there be falsehood in the proof, were it *communiforma*, that is, without witnesses, or by examination of witnesses; yet may it in the spiritual court be undone, if either disproof can be made, or proof of revocation of that will was once made, or of the making of a later.

Vide post. Snp.
P. 9.

9 Ed. 4. 17.
22 E. 4. 50.
22 H. 6. 22.

Now, admitting the will true and right, and also rightly proved; let us yet see the force and strength of the proof or will so proved. It being under the seal of the ordinary cannot be denied, saith one book, to wit; whether this shewed forth be a will proved or not; no, though the proof be but indorsed on the back, *viz.* that it is so proved, saith the Book. But not-

notwithstanding, the defendant so used may deny that the plaintiff is executor, as not being concluded nor estopped by the probate so to say. And the reason is, because the seal of the ordinary is but matter in fact, and not matter of record: nor are the sentences of divorce, and the like, in the spiritual court, judgments or matters of record, as hath often been held.

Plow. Com.

282.

44 Ed. 3. 32.

19 Aff. p. 2.

Of the relation of probate and refusal.

AS for this last point, both the proving and the refusal shall have relation to the death of the testator, as I take it, to divers purposes. So as to the proving, saith the Lord *Dyer* expressly and confidently in *Greysbroke* and *Fox's* case; and the resolution also of the case proves it. For there administration being committed before any *will* proved or notified to the ordinary, as it should seem, the administrator sold some of the goods to *J. S.* and after the executors (proving the *will*) brought an action of *Detinue* for those goods against *J. S.* who pleaded this administration and sale: and thereupon the executor demurred; and judgment was given for him, as having by the proving of the *will* disproved the administration *ab initio*. But it is true that judgment was given only by two judges; one being absent, and the other dissenting in opinion; yet I think it was right and according to law, and that refusal shall have the like relation; else could not the administration relate to the death of the intestate, as it doth to some purposes, expressed in divers books *viz.* to have an action of trespass for goods taken

Proving.

Plow. Com.

281, 283.

18 H. 6. 12. 2.

9 E. 4. 33, 47.

Not to make good a release made before.

Co. lib. 5. 18.

Refusal.

39 H. 6. 8.

2 Ma. Dyer 110.

E

before

Vide post. Sup.
P. 125.

before administration committed, and to have a rent growing payable in that mean time.

What Fees are to be paid upon probate, or for copies of *wills* or inventories.

Per Stat. 21 Hen. 8. cap. 5.

1. *Where the goods amount not to above five pounds, only six pence to the scribe*
2. *Where they be above five pounds, but under forty pounds, 2 s. 6 d. to the B. B. 12 d. to the scribe.*
3. *Where above forty pounds, to be taken but 2 s. 6 d. to the B. B. 2 s. 6 d. to the scribe, or 1 d. for each ten lines of ten inches long, at the scribe's choice.*

THese sums are to satisfy both for proving, registering, sealing, writing, praising, making inventories, giving acquittances, fines, and all other things concerning the same.

Where land is given to be sold, neither the money raised, nor the profits thereof shall be accounted as any of the testator's goods or chattels, saith the statute.

Note, That the *will* is to be brought with wax thereunto ready to be sealed, and proof to be made of the *will* according to common custom.

How the inventory to be made.

For making the inventory, the executor is to take or call to him two creditors or legatees of the testator, and do it in their presence; or, in their absence or refusal, two honest persons being

being the next of his kin; or in their default, two other honest persons.

The inventory is to be indented, and one part left with the ordinary, and the other to remain with the executor.

The executor is to make oath for the truth of it.

For a copy desired by any, either of a *will* or inventory, no more is to be paid than before is allowed for the registering; with the like election to the scribe or register, as is abovesaid.

Mr. *Swinburne* saith, that an executor is to swear, that if it should be thought fit, to be bound to make a true account, when he shall be thereunto lawfully called by the ordinary. Of this account see in page 274. And of accounting some books of the common law make mention, as 13 *Edw.* the third, *Fitzberbert Exec.* 91. where *Trew* saith, that of a thing in action no account shall be before the ordinary; but *Parn- ing* seems of a contrary opinion. And elsewhere it is said, that where a debtor is made executor to the debtee, he shall yet account before the ordinary for his debt: yea, as of money in possession, saith one; which others denied.

An executor by wrong shall be drawn to account before the ordinary, saith *Moyle* Justice. But saith *St. German*, he may not force any to account against the order of the common law; (not shewing what that is.) And *temp. Edw.* the fourth, it is said, at least by the reporter, that after the *will* proved, the ordinary hath no more to do: *quod non credo*.

Also of the oath of an executor divers books teil, but not to such purpose as *Swinb.* but truly to perform the *will*.

See also 31
E. 3. cap. 11.
An administrator shall account as an executor, Fit. Ex. 91. & 837. viz. 1 E. 2. tit. Briefe.
48 E. 3. 14. 15.
Of a duty resting in account it is said, the legatee shall have remedy by account in the spiritual court.
18 Ed. 4. f. 3. Moyle.
4 Hen. 7. 15. per Wood.
9 Ed. 4. 47. Doct. & Stu. 78. b.
21 E. 4. 22.
1 lowd Com. 524. 4. H. 7. 16 kielw.
Rep. 64, a.

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And now by *stat. 4 Ann. c. 16 sec. 26.* The probate of *wills* and administrations shall be in the ordinary of the diocese, for persons working in the King's docks or yards, and the wages due to them shall not be deemed *Bona Notabilia.*

C H A P. V.

What things shall come unto executors, and be Affets in their hands and what not.

THE things which shall come to executors are of great multiplicity, and would make a large and confused heap if tied together in one bundle or lump. I will therefore divide and sort them out in parts, after the best manner I can. First, we will divide them into things possessory, or actually in the testator; and things in action, or not actually in the testator. Secondly, the possessory into chattels, real and personal; or (as some less properly express it) moveable and immoveable.

Of chattels real possessory.

THese may be divided into two kinds, *viz.* living and not living. The living are not many and various. 1. The wardship of the body of another (be it by reason of a tenure of the present owner, or by assignment from the King or other lord of whom the tenure was) is a chattel real, not personal, though it be an interest in the person of another; but it is in re-
spect

spect of a tenure of land, or other hereditament, and is for years, *viz.* during the minority, or till marriage had, and so is real. Next, a villain for years (as by grant for a term from him that had the inheritance) is a chattel real. As for an apprentice for years, it is by custom, as I take it, that he goeth or is derived to executors but for reason after shewed, I think this interest is not in the realty, but in the personalty rather. So of a debtor in execution for debt, the interest in him, or perhaps more properly in his liberty, is not, as I conceive, (for reasons which after I shall express) a real, but a personal chattel. The like law of a prisoner taken in the wars. As for fishes in a pond, conies in a warren, deer in a park, pigeons in a dove-house, where the testator had the inheritance, or but for life, in the pond, warren, park and dove-house, they are not chattels at all, nor go to the executors, but to the heir with the inheritance. If the testator were but a termor, they are to go to the executor, but as accessory chattels, following the estate of their principal, *viz.* the warren, park, dove-house, pond, &c.

If kept in a trunk or cage, &c. they go to the executor. Vide infra p. 57. Cro. Eliz. 372.

The real chattels not living, are either in houses or lands most usually, and that three ways: first by lease for years: secondly, by wardship of lands held by knights service: thirdly, by extent upon judgments, statutes or recognizances; or in things issuing out of houses or lands, as rents, commons, estovers, or such like. But where an inheritor reserves rent upon a lease for years, this shall not go to the executor, but to the heir, with the reversion, other than arrearages of it behind at the death of the

Rent reserved goes with the reversion, save the arrearages.

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testator. Also commons, corodies for years, advowsons, tithes, fairs, markets, profits of leets, and such like, which the testator had for years, all which may accrue any of these ways, as the first, are chattels real. Yea, one simple presentation to a church upon the next avoidance is a real, and not personal chattel, before it come to be void; and what then it is we shall after shew. And the title accrued to the crown upon attainder of felony, where the party held not of the king, viz. the *Annum, Diem & Vastum*, that is, power not only to take the profits for a year, but to waste and demolish houses, and to extirpate and eradicate trees and woods, is but a chattel; and therefore though granted to one and his heirs, by the King, yet shall go to the executor, and not to the heir.

If held of the King the whole is forfeit.

Tem. E. r.
Assize 124.
Fitz.

Some doubtful or less clear cases touching chattels real.

First, where we speak of wardship, it is not to be understood of wardship by reason of socage tenure, for *that* goeth not to the executor, but he shall be next guardian who now, after the death of the first guardian, shall be next of kin, if the ward continue under fourteen years old; else he is out of wardship. Secondly, if one have a lease for three lives to him and his assigns, this is no chattel, nor shall go to the executor, nor to the heir, but to him who first enters and claims it as an occupant, if no assignment be in the life of the lessee made: contrarily of a lease for many years, if three, or more, or less, so long live, this is a chattel, and shall go to the executor. So an extent upon

37. Ass. p. 11.
Such estate pur-
auter, viz. is now
deviseable by sta-
ture.
Extent goes to
the executor.

a statute, yet it is delivered to the party as a free-hold, *viz. ut liberum tenementum*; but that only makes it to be *quasi liberum tenementum* as to the maintaining of an assise, if wrongfully put out. Where one is seised in the right of his wife of land, or other hereditament, and is attainted of treason or felony, the profit thereof accruing unto the crown is but a chattel; and though the King grant it to one and his heirs, yet it shall go to his executors. And if one having a lease for many years, *viz. 100, 500,* or more or less, doth devise and bequeath the same to *A.* and the heirs males of his body, and for want of such issue to *B.* and the heirs males of his body, and dieth, having issue a son; the term shall not go to his son, but to his executor or administrator; for it cannot be made a matter of inheritance. . So if *A.* had died without issue male, the term should not have gone or remained to *B.* but to the executor or administrator of *A.* as was lately adjudged in the exchequer between Sir *Robert Lewknor* and Mrs. *Hamond*. So of an advowson, or any other hereditament, granted or devised to one and his heirs for 100 years: or if such a term or grant a rent out of the land to *A.* and his heirs, or the heirs or heirs males of his body; yet shall the same go to the executor, and not to any heir; for it being derived out of a chattel, cannot be any freehold or inheritance, but is it self a meer chattel. *Partus sequitur ventrem.*

4 E. 3. Ass. 166.
Bro Chat. 15.

A term can't be entail'd. Vide post Sup. p. 173, & 174.

39 E. 3. 37.
So Manwood, if granted for life, it is but a chattel.

Plow. Com. 524.

Of chattels personal.

Personal chattels, or goods moveable, are also in like manner to be divided into quick or dead. The quick are cattle of all kinds;

as sheep, horses, kine, bullocks, swine, goats, geese, ducks, poultry, &c. There may be also in living creatures reasonable an interest, as in a chattel personal; as in the person of a man taken in execution for debt. And this I hold to be in nature not a real, but a personal chattel, (as before was touched) for that debt is the root of it, and the body is but a pledge or gage, dischargeable instantly upon payment, release, or other discharge of the debt. Like law of a prisoner taken in the wars; for thereof and therein, as in a chattel, hath the party a legal interest: as appears by a writ of trespass in the register for taking away a prisoner, *viz.* *Quare quendam Scotum prisonarium suum cepit, &c.* And note lately, *viz.* in the time of King *Hen.* the eighth, the King himself, upon the winning of *Boulogne*, bought divers prisoners of his subjects. And by a statute in the beginning of *Hen.* the sixth his time, this interest in a prisoner is mentioned as valuable, and coming from one King unto another; therefore, doubtless shall go from testator to executor by death, and not to be enfranchised or freed thereby. The interest which one hath in an apprentice I take to be rather personal than real, though for years, because not springing out of any real root, as wardship and villainage do, but out of a meer contract. As for a servant whose master is dead, doubtless he is legally discharged, and is not servant either to heir or executor: but meet and honest it is that one of them continue him in service, till a fit time of providing for him a new master; and fit for him, not to depart suddenly.

No Na. Br.
88. Reg- orig. f.
102.
There it is mentioned, that the prisoner was to pay 159 l. for his ransom. Bro. no, cap 295. & tit. Property 38.

1 H. 6. c. 5.
Apprentice,

Servant.

Now for things personal without life, these are evident, viz. all household-stuff, impliments and utensils, money, plate, jewels, corn, pulse, hay, wood felled and severed from the ground, wares, merchandize, carts, plows, coaches, saddles, and such like moveable things.

More doubtful cases touching things personal.

First, touching things living, if the testator had any tame pigeons, or deer, or conies, or pheasants, or partridges; these as well as chickens, shall go to the executors: so, though not tame, if they were taken and kept alive in any room, cage, or like receptacle, as pheasants and partridges often be; so fish in a trunk, as also young pigeons, though not tame, being in the dove-house, not able to fly out; yet their dams, the old ones, shall go to the heir with the dove-house. And if the testator had any reclaimed hawks, they also as chattels personal shall go to the executor, because they are things commonly vendible. And whereas hounds, grey hounds and spaniels be not so commonly bought and sold, nor so anciently have been; yet they are now grown to be a merchandise; and why not? For although they be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as instruments of musick, both tending to delight and exhilarate the spirits; a cry of hounds hath to my sense, more spirit and vivacity than any other musick. Add hereto, that there may be some profit and advantage gotten by them both *quoad adeptionem boni, & ademptionem mali*, the getting of some food, and the preserving of others,

10 E. 4. 14, 15.
Come of wild ones.
22 H. 7.
Kelw. Rep. f. 88. 118. Co. 11.
11 f. 50.
18 H. 8. 2.
Cro. Eliz. 372.
10 E. 4. 14, 15, and 18.
So of young hawks in the nest. It is felony to steal these; ergo, they be goods.
3 Inst. 98. 109.
Vide post. Sup. p. 181.
So a hunter's horn, a faulkners's lure.
Hare's deer, pheasants, partridges, wild-ducks, &c. are good meat.

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others, as lambs, conies, fish, poultry, by killing foxes, wild cats, and others, which destroy them. And we know that money is recoverable in damages for taking away such, or a mastiff serving to keep an house; so of ferrets to catch conies, &c. Therefore they are valuable. But it may, perhaps be objected, that none of these above are cattle, and therefore not replevisable, consequently, no property in them; for when more than one living cattle is distrained, the replevin is to be by the name of *Averia*, signifying cattle. For answer, not to insist that one may have property in divers things whereof no replevin lieth, as corn or hay not in sacks nor carts, money not shut in bag or box, &c. I further say, that even the word *Averia* may be applied to these: for so I find it to hens and capons in the book of entries, viz. in the writ of *Curia claudenda*, where the plaintiff complains of the defendant's not making his mounds, *per quod Averia ipsius A. viz.* Capons and hens, and other his cattle, came into the plaintiff's house and garden, to his damage, &c. And both *Newport*, and *Newdigate* held that a writ of replevin lieth for such things. Though *Brudenel* was of a contrary opinion, yet he also held an action of trespass maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life; and first to those abroad in the fields. Put the case, that a man dies in *July*, (before harvest I mean) seised for life, or in fee or tail, in his own right or his wife's, or estated for years of land in the right of his wife, being sown with corn or any manner of grain, the common saying is, *Quicquid plantatur solo, solo cedit*: yet this

Fol. 142.

Hen. 8. f. 3.

this shall go to the executor of the husband, and not to the wife or heir, who shall have the land, but hay, growing, *viz.* Grass ready to be cut down, apples, pears, and other fruit upon the trees, shall go to the wife; as also if they had been upon a man's own land of inheritance, they should go to the heir, though the corn should go to the executor. The reason of the difference is, because this later comes not merely from the soil without the industry and manurance of a man, as the other do: and I take hops, though not sown, if planted, and saffron and hemp, because sown, to pertain as corn to the executor. All those yet shall pass to one to whom the land is sold or conveyed, if not excepted, though never so near reaping, felling or gathering. But what if the wife had the lease for years, as executor to some former husband or other friend, and the husband after sowing dies; who then shall have the corn? Certainly the corn shall go to the executor of the last husband, at least so much as is more than the year's value of the land, or the making it up by addition of other things; for the value is to be *Assets* for payment of debts and legacies. Put the case again, that the husband and wife were joint-tenants of the land; then the very corn growing shall survive to her, together with the land; and though the husband sowed it, yet shall it not go to the executor. Being in consideration of things growing on the ground, let us not forget to think of trees sold by *J. S.* seised of the inheritance of the land to *J. D.* who died before felling; this interest is a chattel, which shall go to the executor, and not to the heir of *J. D.* but some colour may be that

Roots of carrots, parsnips, land sown whereon is ripe corn.

Vide post Sup. p. 72.

For he was tenant for life in effect.

The wife also shall have convenient apparel. 33 H. 6. 31. 2 Eliz. Dyer.

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that these, because fixed to the soil and freehold, are real chattels, as the interest in land is, and not personal. So also of trees excepted by him who selleth the inheritance of the land. But in both cases I conceive this interest to be personal, and not real; for that, as it is a property of a chattel in the vendee or vendor with exception, it stands in consideration severed and abstracted from the soil or ground where the trees grew, though the trees be not actually severed by the axe from their mother earth. But if the lessor for years or life do except the trees, these continue parcel of the freehold and inheritance. And after corn reaped, and before the tithe set out, the inheritor of the tithe dying, I think the executor, and not the heir shall have the tithe after set out.

Co. l. 1. 38.

Of houses, or things about the House. 43 E. 3. 6.

Now let us come home to the testator's house, and see in and about it. Some doubt what pertains to the heir, and what to the executor. A question hath been of old, and of late, touching coppers, leads, furnaces, fats for dyers or brewers, pales, rails, glass in windows, tables, dormants, wainscots, doors, locks, keys, and such like, to whom these should go, whether to the heir or executors. And in the latter end of *Hen.* the seventh his time, an executor taking a furnace which was set in the middle of a house, and not fixed to any wall, the heir brought an action of trespass against him for so doing; and it was adjudged for the heir, *viz:* that this was to go as part of the freehold and inheritance to the heir. And long before in *Edw.* 3d. his time, it was debated, whether it was waste in a lessee to remove or take away a furnace, or not: but I find no opinion delivered

21 H. 7. 21.

12 Ed. 3. f. 6.

red by the judges. But in the late Queen's time, Justice *Walmsley* said that the Lord *Dyer's* opinion was, that where the furnace is not fixed to the wall, the lessee might within his term take it away. Contrarily, if it were fixed to the wall; for then it strengtheneth the house. And yet, notwithstanding it might be in the one case so removed by the lessee, yet it is not there, as he said a chattel personal or moveable, so as it is attachable. And there the case being, that a clothier being a termor of an house, had fixed a copper to the wall, with looms and bricks necessary for his occupation; a judgment being had against him, the sheriff delivered the copper in execution as a chattel, and after the lessee took it up, and it was taken from him by virtue of the execution; whereupon he brought an action of trespass; and by all the judges the action was maintainable. And whereas it was found by the jury, that by the custom of *Kent* the lessee might remove such a copper; Justice *Beaumont* said, that without any custom a lessee might so do at any time during his term. But it is to be noted in the said case, that the furnace was by itself delivered as a movable chattel, and not as part of the house; for that was not meddled withal, nor at all delivered in extent, (as in the case between *Miles* and *Prat*, where both house and copper were delivered upon a statute) the house belike being held upon such a rack-rent, as that the party did not desire to have it; for he might have had the whole being a chattel, and so have used the copper during the term. And as touching all other fixed things, the law was taken in the said case in *H. 7.* his time to be all one as in the

H. 37 Eliz.
Austin's case.

Co. lib. 4. f. 93.
94.

the case of the furnace, *viz.* that they should go to the heir; save only that for glafs in the windows, *Pollard* said it was otherwise, *viz.* that that should go to the executors, which none there denied. But since, in the late Queen's time it was otherwise resolved touching glafs, that it should not go to the executors, and the like was there said touching wainscots, and so also by the Lord *Anderson* in the said case of *Austin*. And touching posts fixed, for that they be parcel of the freehold; so also of mill-stones, anvils doors, keys, windows, none of these be chattels, but parcel of the freehold, or thereto pertaining, therefore not to the executors.

Things in gardens.

Now to come to gardens also: whereas I before laid down a difference betwixt things sowed, or not arising from the earth without manuring, and such as grow of themselves; it will thence be concluded that the roots of carrots, parsnips, turnips, skerrets, and such like, coming and arising from yearly sowing, must go to the executor, and not to the heir; the case being so, that the gardener and sower had the inheritance of the garden or soil. Now though in most places this can rarely be a question of value, yet about *London* and some great towns it may, and therefore is not unworthy of a line or two, a thought or two, and the rather for that the reason of this case may give light touching right in other cases. And, in my opinion, these (notwithstanding there is a sowing and manurance to generate them and cause their being) shall go to the heir, and not to the executor, My reason is, for that the thing of profit is the root which is hidden in the ground; I hold it no reason, nor agreeable to the law, that the
exe-

executor should dig and break the soil and ground to search for her intrails : he is to content himself with that which is above ground ; as melons of all kinds, and the like, whose fruit is above the ground ; but as for artichokes, though the fruit be above the ground, yet I think they have not such yearly setting or manurance as should sever them in interest from the soil, therefore they shall go with it to the heir.

Let us now consider of things, though not fixed to, yet usually kept in houses, *viz.* writings and evidences, whereabout generally no doubt can be, but that they follow the interest of the land : so as if they touch inheritance, they pertain to the heir ; if but terms of years, goods, chattels or debts, they pertain to the executor : yea, so do statutes and bonds in law (howsoever otherwise in equity) though they concern the assurance and enjoying of inheritance purchased. What if *A.* mortgage the inheritance of lands to *B.* upon condition of redemption by payment of five hundred pounds to *B.* his heir or executor, and *B.* dieth, the deed being delivered into his hand ? now the heir, not the executor shall have them : for though the money may be paid to the executor, yet (mean-time) the land descends to the heir, nor is there any debt to the executor, for *A.* may chuse to pay, or not. Put it on the other side, that the land had been sold for five hundred pounds not paid to *A.* but a condition, that if not paid to him, his heir or executor, by such a day, then to re-enter ; and *A.* dieth : here is a debt to the executor, and no land descended to the heir of *A.* yet shall the heir have the deeds, for that a condition

dition is descended to him. Question hath been touching boxes and chests wherein the evidences concerning inheritance are: and although the better opinion in our books doth pitch upon this difference, that where they are sealed up, they shall pertain to the heir, otherwise, where not sealed; I cannot conceive that difference to be grounded on good reason, but rather think that boxes which have their very creation to be the houses or habitations of deeds, should, as appurtenant to them, go to the heir, whether sealed or not. On the other side, chests made for other uses, *viz.* the keeping of napery or apparel, shall not, as I conceive, be taken as appurtenant to evidences, because some be in them, for so may other things also be: nor as touching them can sealing be of any effect, but rather locking and not locking must make the difference touching them, if any difference by inclosure.

41 E. 3. 2.
36 H. 6. 26.
18 Ed. 3. 4.
3 H. 7. 15.

Quær. If sole
use, that may
make a differ-
ence or not,

C H A P. VI.

Of things not actually in the testator, but accruing to the executors by or after the testator's death.

THese be of divers sorts: the first and chief whereof are things gotten and acquired by action or suit; secondly, by condition or covenant without suit; thirdly by remainder.

Of things in action.

TO speak first of the first, it is clear that debts due to the testator, be it by bond, statute or judgment, or for arrearages of rent, are not *Assets* to charge the executor until receipt of them: and it is clear that the action to recover these doth pertain to the executor, and that the debt and damages recovered shall be *Assets* to charge the executor. So also of actions of *Detinue* and of covenant for any thing personal, or any chattel real, lease, wardship, or the like. But perhaps some will doubt of covenant touching inheritance, *viz.* the assurance of lands, or enjoying thereof free from this or that incumbrance, or the like: Yet even in those cases, if the covenant were broken in the testator's lifetime, I think clearly the action is accrued to the executor, for that his testator was to recover damages in the action of covenant for that breach; and he being intitled to these damages as principal, and not any accessory thing in that action, the law hath cast that action upon the executor. And that is the cause why, if waste be committed in the life of the lessor by his lessee, and then the lessor dieth, his heir can have no action for this waste, *viz.* because he cannot recover the treble damage; so neither can the executor have it, for that he cannot recover *locum vastatum*, the place wasted, the inheritance whereof is in the heir.

Vide post. Sup. 75.

A church of the testat. inher. become void in his life comes to the exec. as a thing in action; but is not *Assets*, for not vendible.

That the executor at the common law could not maintain an action of trespass for goods of his testator taken away in his life-time, seems to be implied by the statute in the time of K. Edward

11 H. 4. 22.
45 E. 3. 3.
No. Na. Br. 596.
4 E. 3. c. 7.
4 Ed. 3. c. 7.
gives the action to executors.

F ward

And the like given to executors per stat. 25 E.

3. c. 5.
17 E. 3. Fit.
106.

25 Ed. 3. c. 5.
gives such action to executors of executors.

C. 21. meant, ut credo 21 H. 6. 1.
But Markham e contra.

21 H. 8. c. 19.

4 E. 3.
The B. of Coven.
and L. and Sale's
case, M. 32 &
33 El. in Com.
Ban. So of ravishment, de gard.

7 H. 4. 2. &

7 H. 4. 6.

Eject. Firm. &
de clauso fracto
meerly it lieth
not.

ward the third, which gives such action. Yet it seems that a replevin was maintainable by the executor, at least in some cases, for goods taken or distrained in the testator's life-time. But in case the distress were for rent or service, it is said, a little after making of that statute, that the lord may not now avow for his rent or service, because his tenant is dead, but must set forth the matter, and thereupon justify to excuse himself from answering damages; and the executor shall by this action recover the cattle or goods, and that by the common law, saith the book, though the statute of *Marlbridge* had never been made, for that the propriety remained in the testator. Note; it speaks not at all of the said statute of 4 *Edward* the third. But *Newton*, in the time of King *Henry* the sixth, would have it, that the executor in that case should not have a replevin, but an action of trespass grounded upon the said statute, *viz.* 4 *Edward* the third, which methinks cannot be by any means, by reason of the statute of *Marlbridge*, cap. 3. *Non ideo puniatur dominus, &c.* for the executor, as well as his testator, is thereby restrained, as I think, from the action of trespass against the Lord. * As for that no avowry can be made upon the tenant, that is now remedied by a late statute. The other statute hath been taken to extend to other things than goods moveable: for where a church becoming void, a stranger presented thereunto wrongfully

* By 21 H. 8 c. 19. In replevin the avowry or confession may be made upon the lands, without naming any certain person to be tenant thereof.

wrongfully, and the patron died; it was resolved in the late Queen's time, that the executor might by the equity of the said statute maintain a *Quare Impedit*. But whether an action of trespass lieth for an executor against him who spoiled the testator's corn, grass or wood growing, hath been questioned, but no where resolved to my knowledge. I think it may lie with some difference. First, for that the statute of 4 *Edward* the third doth not only speak of goods carried away, as limiting the law to that trespass solely and particularly, but speaks generally of trespasses done to testators; and then brings in that particular of goods, as one instance. Now there may be many cases of instances or ensamples given in acts of parliament, which yet do not restrain the remedy or purview to that particular, or for extending to other cases of like nature. Thirdly, the statute speaks of trespasses remaining unpunished, which it meant to redress: But it should still leave many unpunished, if it should have no larger extent than to that one singular trespass of goods taken away, *viz.* moveables. Again, the testator was clearly entitled to a recovery of damages for this other trespass, which if he had recovered, should have come to his executor: Yea, the things themselves, all, if felled in the testator's life, and part, though not felled, should have come to the executor; therefore all the damages recoverable in lieu thereof, out of which (recovered) the debts and legacies of the testator are to be satisfied. Beside, this action of trespass is a thing severed from the state of the land, so as if the owner thereof had, after this trespass done, aliened the land, yet had not this action

11 H. 4. 3.
This Periam
Just. did very judiciously urge in Sale's case supra. The words of the act are, executors shall have an action for a trespass done to their testator, as for his goods and chattels carried away in his life, and shall recover their damages, &c.

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remained to him, as I take it clearly. And why not as well as where a trespass is done upon the lands of the lessee, and then the term expires? This doubtless doth not take away his action, nor his executors. But methinks here may be some differences probably taken: as first, between a trespass in destroying or taking away corn growing, and a trespass in grafs or wood growing. For the first being of that nature, as that, though the owner had a state of inheritance in the land whereon it groweth, and should have died before severance and felling, yet it should have gone to the executor, and not with the land to the heir; therefore doubtless doth the action for destroying or taking away thereof accrue by the operation of law to the executor, in lieu of the thing taken or destroyed. Otherwise, perhaps, of wood or grafs, which by the owner's death should have gone to the heir, and not to the executor. And yet here again another difference, methinks, may be betwixt grafs and grafs, *viz.* betwixt that in pasture and that in meadow, yearly mowed and turned into hay, not left to be consumed by the mouths of beasts, as that growing in pasture: For as the law distinguisheth between these soils, it gives precedence to meadow, and makes it waste for a lessee to plow it up, not so for pasture. Yea, tythe is paid of hay, but * not of grafs growing in pastures: so the meadow grafs, being in the owner's purpose and intention as a thing severed from

* Tythe of Agistment is payable for depasturing unprofitable cattle upon grafs growing in pastures. *Bunb. Rep.* 1. 3.

from the soil, should, methinks, so be also in the eye and estimation of the law, and therefore stand in a different state and account from pasture grafs.

A third difference may be in the manner of the trespass, *viz.* Where meadow grafs is eaten up with cattle by a trespasser, and where by him mowed and carried away as hay: for in this later case an action of *Trover* and *Conversion* for so many loads of hay is doubtless maintainable by the executor; though it should be admitted that in the other case, of consumption by the mouths of beasts without severance, no action should be maintainable by the executor; which yet I admit not, but think the contrary probable.

For when meadow-ground, which yearly conceiveth, (*Sol sine homine generat herbam*) shall be ready to be delivered of her burthen, if a stranger put in a herd of cattle, which swallow up and tread down this fruit of her womb before the mower with his scythe come as a midwife to help her delivery, if then by the hasty death of the owner, before action brought, this great trespass should be dispunishable, it were contrary, as methinks, to the purpose of the said statute, and a great defect in the law.

At least, methinks, action upon the case here and before should be maintainable.

Yet here, perhaps touching this, a fourth difference may be or arise out of the time of the death of the owner, *viz.* where he died before time of mowing, and where not; for *dato* that in the former case, because, if such destruction or consumption had not been, yet the owner dying before severance, this should not have come to the executor, but have gone with the soil to the heir, that therefore the executor

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who is not damnified, should recover no damages. Yet in the other case the owner living till after hay-time clearly passed, *viz.* till the end of *August*, methinks now, since this fruit of the meadow's womb should have been a chattel severed, had not this trespasser made unlawful prevention; therefore the execution to whom the same should have come towards the performance of the will, should have out of the said statute, an action and remedy reached unto him to recover recompence in damages for this wrong done *in retardationem executionis testamenti*.

A fifth and last difference may perhaps be in the state of the owner: for *Posito* that where the land is his freehold or copyhold inheritance, no action should be given to his executor for wood or grafs taken or destroyed in his life-time; yet where he is but tenant for years, guardian, or tenant by extent, so as the very 'state in the land was to come, and is to come to the executor, (together with *quicquid plantatur solo*) methinks the executor should have, together with the 'state in the soil, the action to punish the robber of, or trespasser upon the soil. Thus having scanned and sifted to the best of my ability, all differences and circumstances of this point, how far I am wide, and wherein right, *Aliorum sit judicium*, or rather, *Alioris esto judicii*. But this is clear, that wheresoever executors do recover any damages for trespass or other wrong done to their testator, the money recovered (at least if execution be had, or money received) will be *Assets* in their hands, as well as debts recovered upon bonds, or bills, or lands by them taken in extent upon statutes, recognizances or judgments. Yea, without ever having these monies,

execu-

3 H. 6. 3.
 Little. f. 84. a.
 So held in Sale's
 case of damages
 in Qua. Imped.
 recovered.
 Contra of the
 presentment,
 releasing.
 23 Ed. 3. tit. 91.

executors may make them *Assets* in their hands, *viz.* by making releases or acquittances, or acknowledgment of satisfaction; for this amounteth to a receipt, and chargeth the executors towards the creditors with the whole penal sum, though haply they receive but part, as the principal, or some like proportion.

Therefore there is great caution to be used by executors in this kind, that unless they be sure they have goods sufficient to pay all debts and legacies, they make no release, acquittance, or acknowledgment of satisfaction, for more than they receive, be it debt or damages.

And the like caution is to be used by them touching submission of debts or damages to arbitrement, whereby discharges of the same may grow: for the submission to the arbitrement being their voluntary act, although the arbitrators by their judgment do discharge the debt or damage in part, or in whole; yet shall the creditors have like remedy thereupon against the executors as if they had released, or, which is more, received the same.

Error 13 H. 4.
6.
46 E. 3.
Yet upon a verdict in Qua. Imped. the wife not the executor of the husband did seise.
9 H. 6. c. 4.

Other actions there be of discharge, which as the testator himself in his life-time might have had, so may his executor after his death, *viz.* Writ of error, attaint, disceit; *Audita querela*, *Identitate nominis*. But this last is given by statute. Whatsoever is regained by any of these ways as unduly lost by the testator, shall also be *Assets*.

Special cases pertinent to the premisses.

1. Chattels come to the executors from the testators, yet not Assets. 2. Assets which be no chattels. 3. Things in action, and in the personalty, turned into chattels real, & e contra.

AS to the first, I exemplifie thus: *A.* makes *B.* his executor, and dies; *B.* makes *C.* his executor, and dies: the goods left by *A.* to *B.* as executor far exceed his debts and legacies. Or let us suppose no debts nor legacies of *A.* and that *B.* dieth much in debt above the goods he leaveth, and did make no alteration of the property of the goods of *A.* but meerly left them to *C.* his executor. Now shall not the goods which came to *B.* as executor of *A.* and so from *B.* to *C.* be liable in law to pay the debts of *B.* yet in conscience methinks they should, and that *C.* should not receive them to his own use, as in law he may, where *A.* left no debts. But if *A.* making *B.* executor, did also by his will give him all his goods, and he in his lifetime made election to have them as legatee, or by his will did so dispose of them, or appoint them to go, as the goods he had as executor; they could not be otherwise given or disposed. Now by this election they were altered in property from being his as executor, and so as his own goods should be liable to his debts. But things in action could not be so given or disposed, viz. Debts, &c. Yet if *D.* were indebted to *A.* one hundred pound, and *A.* his executor

Or if a stranger
usurp in his life,
and he dying his
executor recovers
in a Qua. Imped.
10 Com. Ban.

as by Sale was done infra, Mich. 32 & 33 Eliz. So held in Sale's case, Venders jure potest, emeret ipse prius.

took

took a new bond of him, or another for it, giving up the old bond; now was it become his own debt, and so shall stand in his executor.

Another instance of this, thus: if *A.* patron of the church of *D.* grant to *B.* the next avoidance, the church becomes void, *A.* dies before he presents, his executor presents, and hath the benefit of preferring his son or friend; yet shall this make no *Assets* in his hands for payment of debts, for that he could not lawfully take money to present. But if *B.* had died before the church had become void, then, because the executor might lawfully have sold it, the value should be *Assets* in his hands, as I conceive; except perhaps the incumbent had died so hastily after *B.* that the executor had not time convenient to find out a chapman and to sell it.

If in the other case a stranger had presented, and got his clerk admitted; and the executors of *B.* had in a *Qua. Imp.* recovered damages; the money so recovered should have been *Assets*. Thus much of the first, *viz.* that some things of the nature of chattels may come to executors, and yet not be *Assets*.

Touching the second, *viz.* that some things may be *Assets* in the hands of executors which yet are no chattels, I shall give but two instances. First, where a man leaveth a villain for years to his executors, and the villain purchaseth land in fee-simple, and the executor entereth into the land; now hath he fee-simple therein, and this land is *Assets* for payment of the testator's debts. So if a man by his will give lands in fee to his executors, to be sold for performance of his will; these (before the money thereby raised) are *Assets* both for payment of debts

22 H. 8. Br.
Villainage, 46.
If he die, how
shall this be *Assets*
in the heir.

3 H. 3. 63. and
so 2 H. 4. 21.
If by seoffment,
Per Markham
Cap. Just. con.
Rickhall.

debts and of legacies. But if the lands had been given to be sold only for payment of debts, they should only be *Assets* for that purpose, and not for payment of legacies: and so if it were expressed to be for payment of legacies singularly, this should not be *Assets* for debts, as I take it. For since these are not *Assets* of their own nature, but so made by the *will* and disposition of the testator; methinks they cannot be otherwise nor farther *Assets* than as the testator hath willed and disposed. But though lands thus given were *Assets* before the stat. of 21 Hen. 8. cap. 5. yet how can it be so, since the very words of the statute be, that if one do *will* by his testament or last *will* any lands. &c. to be sold, neither the money thereof coming nor the profits taken shall be accounted as any of the goods or chattels of the testator's; which I conceive to be all one as to say, that they should not be *Assets*. For when an executor denieth himself to have *Assets*, the form of his plea is, *Quod nulla habet bona nec catalla, &c.* Yet since that statute, *viz.* in the late Queen's time, the law was twice admitted or conceived still to be according to the third of Hen. 6. *viz.* that the land devisee to be sold, or the money thereof coming, should be *Assets*. Indeed in neither of those books is there any mention of the clause in the said statute; and it is possible that it might be forgotten, as in other cases sometimes hath happened. But casting about how to reconcile those books with the said statute, and not to suppose the same forgotten at both times, both at the bar and bench, (though, being but a short clause in the middle of a large statute to other purpose, it might well so have been) at the

See 9 Eliz.
Dyer 234:

Construction of
general words in
a statute, secundum
subjectam
materiam.

9 H. 6. 264.
14 H. 6. 36.

the last, though not hastily, I grew to conceive, that the said clause being in an act which limiteth the fees of ordinaries, and their scribes, according to the value of the goods of the deceased, and then bringeth in this clause, that the lands willed to be sold shall not be accounted as any of the goods, &c. the parliament meant thereby only to exclude them to this purpose, that they should not be accounted as part of the goods in the valuation, according to which the said fees were to be rated: and though the words be general, that they shall not be accounted as any of the goods, &c. yet it is the more probable that the parliament intended no farther than as aforesaid, because that clause, after the fees limited in answerableness to the values, is brought in by a *Proviso, viz.* Provided always, that if the deceased willed any lands to be sold, the money nor profits shall not, &c. And thus perhaps it was understood and construed in the said late Queen's time; though no mention be of any remembrance of that clause or provision in either of those cases reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the personalty into the realty, & *e contra*, I shew it thus: if a debt were due to the executor as executor, by statute, recognizance, or judgment, and he sue execution, and have land of the debtor's in extent; now is the personal duty turned into a chattel real. On the other side, if such an estate by extent, or a lease for years mortgaged, come to an executor, and the debtor or mortgagor payeth the money due: now are these real chattels turned into *Assets personal*.

Another

Another special case of equity opposing law.

Suppose the condition broke in testators life, Qu. to whom it pertains in that case. Vide ante p. 65.

IF *A.* be bound to *B.* by bond, statute or recognizance, for assurance of land, *B.* dieth, and the land descends to his heir; or be it that *B.* sold the land to *C.* and assigned to him the bond statute, &c. yet must the suit or taking out the extent be in the name of the executor of *B.* and neither of the heir or assignee. And that which is recovered or gotten in extent will be *Assets* in law to charge the executor, as I take it; yet in equity it pertains to the heir or assignee. *Quære*, if the executor meddle not, but only suffer his name to be used.

Of things come to executors by condition.

First we will consider of conditions bringing back to executors goods or chattels granted away by their testators. Touching which there is no doubt, but if the condition be any other than for payment of money, or other things valuable by the testator or his executor the chattels returning to the executor are *Assets* in his hands: as put the case, of a lease for years; horses, sheep, plate, or other chattel, were granted by the testator to *A.* upon condition that if *A.* did not pay such a sum of money, or do such other act as the testator appointeth, &c. and this condition is not performed after the testator's death; now is the chattel come back to the executor, and is *Assets*. But the question hath been, (and perhaps may be) where the condition is, that the testator or his executors shall pay the money to make void the grant, and

and accordingly the executor after the testator's death payeth the sum out of his own purse, not having any money of the testator's in his hands; in this case coming in question *tempore Hen. 7.* ^{21 H. 7.} it was resolved at the last, that this redeemed chattel should not be *Assets*, but be to the executor as his own proper goods, though at the first three judges were of a contrary opinion, *viz.* that the goods redeemed should be in the executor as goods of the testator. And truly I must confess, that I cannot yet find good satisfaction in that book's resolution, except we shall take the case there to be such as that which is put and reported by the Lord *Dyer*, *tempore Hen. 8.* *viz.* that the money paid for redemption was as much as the full value of the goods pledged or mortgaged; or else shall admit the case to be, that this redemption was not by payment at the day conditioned. As to the first, it were rare if any should lend money upon a mortgage, where the thing mortgaged is not of better value than the money lent; rare also that an executor should take care to redeem with his own money that which should yield no benefit or advantage to him, or his testator. Let us therefore scan and examine the point, since the same may come frequently in use: and this we may the more decently do, because the Lord *Dyer* in the margin of the case by him reported, as aforesaid, saith expressly, that the said other *temp. Hen. 7.* was not at all adjudged, himself having viewed the roll, which he there sets down, and the names of the parties; we will therefore put the case thus: *A.* possessed of a lease for sixty years of one hundred pounds land mortgageth it for five hundred pounds; or be it that the mortgage or pledge be of a jewel
or

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or piece of plate for half the value; and now before the day limited for payment and redemption, *A.* having made *B.* his executor, dieth, and *B.* at the time and place maketh payment as was conditioned: now the question is, whether this lease, plate or jewel, being worth much more than the sum for which it was mortgaged, shall be in him wholly in his own right and to his own use, or partly, if not wholly, as executor to *A.* so as to be subject to the payment of debts and legacies. Here it must be clearly admitted, that *B.* was enabled to this redemption only and meerly by the condition annexed to the mortgage or pledging. It must also be admitted, that this condition, and the power or interest to take benefit thereof, came to him and was derived only as executor of *A.* This being premised, it must needs follow, (as to me it seems) that the condition working and having his operation in the redemption to destroy the grant, mortgage or pledging, it must needs make these things again the testator's goods *in statu quo prius*, and so to be in *B.* as executor; since in that right only he was intitled to take benefit of the condition. For what is it which hindered, before this, from being the testator's goods? nothing certainly but only the force and strength of the mortgage or pledge. Now by the redemption, that is become void, and hath lost its force; therefore the property of these things must now needs be as if no such mortgage or pledge had been, or as if it had at the first been void and of no force. Thus must the condition work for him who made it, *viz. A.* the testator: and those of the contrary opinion in the time of King *Hen. 7.*
do

do yet say, that by this redemption the testator is so much indebted to the executor as he disbursed for the redemption; which could stand with no reason, unless by it the property and interest should be reduced to the testator's behoof. That thus it is, is also proved as to me it seems, by the case of mortgage of inheritance, upon which the heir making payment, according to the condition, is not now in as a new purchaser, but as heir, so as he shall have his age, and be in ward even for his land; yea, it shall be *Assets* in his hands for satisfaction of his father's, as other ancestors debts: which in some respect is a harder case than that of the executor; for he hath means to satisfy himself of the money disbursed, either out of the thing redeemed, or other goods of his testator, but the heir hath no such means. Yet it will be asked, how the executor can be free from mischief: for if this thing redeemed be intire, as the cup or the lease, the whole will be taken in execution for the testator's debts. To admit this, yet here is one clear way of remedy, *viz.* The executor may before such execution sell the thing, and so pay himself, and retain the surplusage to the testator's use; and the like of this is frequent in use, *viz.* for executors to pay off the testator's debt with their own money, and to make themselves satisfaction out of the testator's goods. Besides, it is not impossible that this redeemed thing should be thus in interest parted, that answerably and proportionably to the sum disbursed for redemption, with reference to the value of the thing redeemed, a moiety, or third part, or three parts thereof, should be to the executor in his own right, as
his

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his own proper goods, and the rest in him as executor. As *posito* that *A.* and *B.* were tenants in common of such an entire chattel: *A.* maketh *B.* his executor, and dieth. Now hath *B.* one moiety as executor, and another as his own proper; and upon a judgment against him as executor, that moiety only which he hath as executor must be taken in execution. And here may be remembered, how in execution of a judgment, or levying of an amerciament out of an entire chattel of more value than the sum to be levied, the whole is to be sold, and the surplufage above the debt or amerciament is to be delivered back to the owner. For in all this debate, we must presume the thing redeemed by the executor to be of better value than the sum paid, else we may easily admit the whole to the executor.

Again the lease for years is not so entire a thing, I mean the land let, but that thereof partition may be made, yea, enforced by action, between joint-tenants and tenants in common. But here will be objected the case of redemption by the daughter and heir, who though she hath a brother born after, so as now she is no longer heir, yet she shall, as the book saith, retain the land redeemed from the heir as a perquisite or purchase. As for this, (which I will not oppose) the law so framed to the favour of the daughter, because of great mischief to her, if, being stripped of the rest of the inheritance by the birth of a brother, she should also lose that which her money had redeemed, without having any remedy to have her money again, or any recompence for it. But in the other case

case there is no such mischief, for that the executor may pay himself, as hath been shewed.

Now on the other side, if the case shall be understood that the redemption was by payment after the day, then will I easily admit that the property or interest is in the executor to his own use; or that the condition now having no power to reduce it back, or to operate any thing, it is rather a re-emption than a redemption, since it was at the *will* of the mortgagee to dispose of it at his pleasure; and any stranger, as well as the executor, might thus have redeemed, *viz.* repurchased it: therefore only equity, and not law, in that case can make any part of the value, *Assets* in his hands. And so also, I think, if we should admit in the other case of payment at the day, that the property of the chattel is to the executor as his own, and not his testator's goods, no part of surplusage of value can in law be *Assets*, howsoever in equity.

Lastly, if the executor redeem by payment at the day with the testator's own money or goods, none will doubt but that the thing redeemed is in him as executor, and the money by him paid for redemption is well administred, the goods redeemed being of better value. But this way it makes no difference whether the whole value of the goods redeemed shall be held *Assets*, and the money paid for redemption stand drowned therein; or that that sum be still adjudged in the hands of the executor as *Assets*, and only the surplusage of the thing redeemed over and above the sum paid for redemption.

Things accrued by covenant or assumption.

IF *A.* covenants with *B.* to make him a lease of such or such land by such a day, and *B.* dieth before the day, and before any lease made; now must *A.* make the lease to the executor of *B.* and the lease so made to him shall be in him as executor, and consequently as *Assets*, This is proved by the judgment in the case between *Chapman* and *Dalton* in the late Queen's time. Yet I confess that it is not expressed in the resolution of this case, that this lease should be *Assets*, but that the executors should have the term as executors, which implieth as much in my understanding; and the declaration, whereupon the defendant demurreth, sets forth the breach of that covenant to be *in retardatione executionis Testamenti*, so as the damages thereupon recovered, *viz.* 330*l.* were *Assets*, and consequently also should the term have been, in lieu and recompence whereof these damages were given. The like law, if *A.* assume upon good consideration to deliver to *B.* by such a day 20 quarters of Malt, or so many loads of coals or wood, or any other wares or merchandize, and this is not performed in the life of *B.* but after to his executor; it shall be to him as executor, and shall be *Assets* in his hands, as well as the money recovered in damages for not performing should have been,

Flowd. Com.
292.

Of things accrued by remainder or increase.

IF a lease be made to one for life, the remainder to his executors for years, and he dieth; this will be *Assets* in the hands of his executors, though it were never in the testator, as was in the later end of the late Queen's time resolved by three justices, the Lord *Anderson* only being of a contrary opinion: and there it was said that *Cranmer's* case, wherein the contrary in effect was resolved, was of little authority; for that there were first two judges against two, till after *Mounson* changed his opinion, upon a conceit that there the estate was by way of use; which could make no difference. Like law, where a lease for years is by *will* bequeathed to *A.* for life, and after to *B.* who dieth before *A.* although *B.* never had his term in him so as that he could grant or dispose it, yet shall it rest in his executor as his goods, and be *Assets*. As for a remainder for years so in the testator that he might grant or dispose it at his pleasure, no doubt can be thereof; though the same fell not in possession to the testator in his life-time, yet no scruple nor doubt can be but that this is *Assets* to the executor, even whilst it continues a remainder, and before it falleth into possession, because it is presently valuable and vendible.

Nor much of other nature to these are the cases, where the executor merchandizing with the goods of his testator maketh gain thereof. 11 H. 6. 35 per Babington.

So if the sheep, or other cattle of the testator do breed, *viz.* bear lambs, calves, colts, &c. after the testator's death, even these which were never in the testator shall yet be *Assets*; and so the wool growing upon the sheep after the testator's death. But there is one case worth the

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consideration, and worthy of some doubt, as I think, and that is this: One leaveth to the executor a lease for years of land worth 20 pounds by the year, and the executor, keeping this in his own hands one year after the testator's death, doth make thereof thirty pounds in clear gain above all charges, now whether, as to a creditor, the whole thirty pounds shall be *Assets*, or only twenty pounds? and the case, simply thus put, shall be understood of an occupying and manuring without any stock of the testator's; and then, if the executor did stock it with his own sheep or other cattle, as he must have born the loss by rot or death, so is it reason that, if the manurance prove gainful, he reap the fruits thereof in recompence of his adventure, and of his industry, skill, and good husbandry. But if the testator's stock of sheep and cattle were (as of necessity, or for the better advantage of the testator's estate) continued upon the lease-land, then is it reason that the gain or loss, whethersoever of them God sendeth, do redound to the testator's estate. Like law, (as I think) if an executor, finding that he cannot instantly after the testator's death let the lease, at or near the value, shall therefore buy seed-corn, and hire the plowing, &c. But it may be said, that the lease hath one entire valuation at the first upon the appraisment. To this I answer, first, that the value upon the appraisment is not binding, nor much respected at the common law: if it be too high, it shall not prejudice the executor; if too low, shall not advantage him: but the very value found by the jury, when it comes in question whether the executor have fully administred, or have *Assets* or not, is that

that which is binding. Next I say, that if a long lease come to executors of land worth an hundred pounds by the year, and no sale is made thereof by the space of a year or more; now the term continuing of the like value as at first, it is no reason but the hundred pounds raised the first year should go towards the payment of debts and legacies, rather than any of them should be unpayed. These things, I mean the knowledge of them, are useful two ways, *viz.* First, to give light to executors, to discern what unto them of right pertains: next, to shew unto creditors and legatees what, and how far, things shall be *Assets*, that is to say, goods to enable, charge, and bind executors to pay debts and legacies. For whatsoever, any of these ways, cometh to the executors from their testator, or is recovered by any of these actions, shall be in their hands *Assets*, the costs and charges of recovering deducted.

C H A P VII.

What manner of interest an executor hath in his testator's goods and chattels, and how different from the common interest which they or others have in their own proper goods.

THE interest which an executor hath (as executor) in the goods of his testator is much different from the absolute, proper and ordinary interest which every one hath in his own proper goods, as may well appear in and by these points. First, Although a stranger take away these goods,

In F. N. E. the writ for the executors is, *Quære 4 boves qui fuer ipsius C. sub custodia ipsius executor' apud N. invent. cepit. F. N. B. English, p. 193.*

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trespafs for the executor is of general nature, *Quere bona sua cepit*, calling them his; whereas a man outlawed in debt, or convicted or attainted of felony or treason, forfeiteth all his own goods, yet these which he hath as executor shall not be forfeited. If a villain be made executor, his lord cannot take these goods, though he may take all the villain's own goods: and for taking such goods, or for a debt due to the testator, a villain may sue his lord. Nay, if the executor grant all his goods, some good opinion hath been, that these which he hath as executor should not pass; yea, the Lord *Dyer* so held in the late Queen's time, with this difference, *viz.* Where the grantor is named executor in the grant there the goods which he hath as executor should pass; but otherwise, if he be not named executor in the grant. And that this opinion is probable, will farther appear by that which followeth.

Secondly, The executor cannot by *will* give or bequeath the goods he hath as executor; and if he die intestate, and administration of all his goods is committed to *J. D.* yet hath he nothing to do with the goods which the intestate had as executor to his testator: thus all is goods reacheth not to his goods as executor.

Thirdly, Whereas a man's goods stand liable to the payment of his debts both in his life-time and after; the goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognizance, statute, or judgment had against him. And if such a one die indebted, leaving to his executor much goods which he had as executor; these are not *Assets* in his hands liable to the payment of his debts.

Li.
age 4.
1 E. 4.
Yet 39 H. 6. f.
15. A release
of all actions
by an execu-
tor extincts
actions as execu-
tor. But Fro-
wick is against
it in 26 Hen. 7.
Kei. 64.
Villain may sue
his lord in such
cases, and reco-
ver damages to
testator's Use.
Co. Lit. f. 2.

The commission
of administr. is,
omnium bon' &
catallor' jurum
& creditorum
quæ fuer' the in-
testate's.

See these so re-
solved in Pl.
Com. 525, in-
ter Bansby and
Grantham.
P. 20 Eliz.

v. G. Case

debts, but only for the payment of the first testator's debts or legacies. Therefore a *Quo minus* brought by an executor, shewing that he was not able to pay the King's debt, because the defendant detained from him an hundred pound, which he owed him as executor to J. S. was overthrown; for that it could not be intended, saith the book, that the King's debt could be satisfied with that which the plaintiff should recover and receive as executor. Whereas a woman being possessed of any chattels personal, *viz.* moveable goods, all are devested out of her into her husband by her marriage, so as if he die, and she over-live, they be not heir's again, but her husband's executors or administrators; and if she die, all be the husband's without being executor to his wife, It is not so of the goods which he hath as executor; these still remain in and to her if her husband die; and if she herself die, for that she hath them as it were in another's right, *viz.* as she represents the person of her testator, her husband shall not have them, if he be not his wife's executor, and so executor to her testator,

Lastly, Whereas the writ of trespass seems to make no difference between one's own goods and those he hath as executor, that being a possessory action or suit grounded upon the possession; yet come to an action of detinue, which more tastes and participates of the right, and there are they differenced: for where for my own debt, when I sue, the writ saith, *debet & detinet*, *viz.* that the defendant owes me and detains from me that sum; yet when I sue as executor, the writ saith not *debet*, he doth owe

The writ may be in his name only out of whose possession the goods were taken.

Co. l. 5. f. 5r.
If the action be of such a nature that he ought to name himself executor, it shall be in the detinet only otherwise *è contra*.
20 H. 6. 5.
5 Co. 32.
Winch 80.

Lane 86. S. C. Vide hic postea p. —. Sup. p. 43.

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me, but *detinet* only, he detains from me, as admitting that he is not debtor to me, though he should pay me. And so where I am sued as executor, the writ makes me not a debtor, but a detainer: otherwise, where in my own right I owe and I am sued for a debt. Accordingly, where judgment in an action of debt is given against one as executor, it is not generally that the plaintiff shall recover against him, but he shall recover of the goods of the testator; and therefore upon this judgment no *capias* lieth against him, to enforce him to pay by arrest of his body, because he is not properly debtor. But if after it be returned, that he hath wasted the testator's goods out of which the said debt should be satisfied, then, he having made himself a debtor, a *Capias ad satisfaciendum* shall be awarded against him, and then he shall be taken in execution. So also in some cases of false plea pleaded; for where the judgment is *de bonis propriis*, the plaintiff may have a *Capias ad satisfaciendum*; and that judgment is in divers cases for the damages, although not in many for the principal. As for the *Capias* before judgment, in the mean process against an executor, that is because of his contumacy in not appearing upon the former process.

34 H. 6. 45.

The reason of this different interest between an executor and another, or between the same man's having goods as executor and others in his own right, as also of the different manner of one's being indebted as executor, and otherwise in his own right, is well expressed by the Lord Cook in *Pinchon's* case, *viz.* First, that the goods which one hath as executor he hath not in his own right, but *in auter droit*, that is, in the
right

right of another, meaning his testator. Secondly, That executors are but the ministers and dispensers, or distributors, of their testators goods,

Co. lib. 9. 86. b.
See this also
Plow. Com. 5.
20. a.

Of alteration of property in the executor's hands, so as some goods become his own, which he had as executor.

TO this head or chapter, treating of the difference between the interest in goods as executor, and others had meerly in one's own right and to his own use, it is not impertinent to consider how that which one hath at the first as executor may be changed in property, and become the executor's own to his own use, as other his goods which he had not as executor. Here let us first consider of ready money left by the testator: for since pieces of money, viz. shillings, groats, pieces, and half pieces of gold, cannot be known one from the other, it must needs follow, that these coming to an executor from the testator, must in some sort be altered in property, so as though the executor shall be said to have so much in money or value, yet can it not be discerned which money in his house was his testator's, and which his own. Consequently the sheriff, upon the *feri facias* for a creditor, who hath recovered against the executor a debt owing by the testator, cannot take away money in execution as the testator's in my opinion. *Quere*, if thereupon *Devasta.* shall be returned, or what shall be done.

But what if the testator were indebted to the executor, or if the executor, not having ready money of the testator's, or otherwise, shall pay a debt of the testator's with his own money, what

2 El. Dy. 185.
This divers
books affirm,
20 H. 7. 4. &
Kel. Rep. 59. &
2, 3 El. Dy. 117.
6 H. 8. Dyer
f. 22.

what shall we say of the conversion or alteration of some of the goods from being his as executor, to be his meerly in his own right? Hereof I have shewed elsewhere my conceiving, which is briefly thus; that except either he have in his hands money of the testator's (for of that it is easie to make a proportionable change) or unless the sum to him owing from his testator, or by him paid for his testator, amount to the full value of all the testator's goods in his hands, or do exceed the same, no alteration can be, until some election or declaration by the executor made, which of the goods not exceeding the debt unto him, he will have to be his own: for where the testator's goods exceed this debt to him, the property of all cannot be changed; and of what part shall the law adjudge the change, till choice by the executor? It is good therefore for him to do as the mother-guardian in focage, who is to endow herself, calling her neighbours, and expressing to them which part of the land she will have for her dower. So let the executor do. But let him take heed that his election or declaration exceed not his debt, lest it be void. And that such particular election is to be made, seems to me proved by the case of 21 E. 4. fol. 21. b. where the payment of money, and detaining or taking of a horse of the testator's, is mentioned. But *Choke* there says, this cannot be done without the ordinary's assent. And the reporter thinks, though the ordinary do assent, yet the property shall not be turned into the executor as his own.

Another alteration is of the profits of a lease come to the executor from the testator: for since no more thereof shall stand in the executor as

Assets

Plow. 554. So of a legacy in money given to the executor.

See 2, 3 El. Dyer 187.

Assets than so much only as exceeds the yearly value, according to the resolution in *Hargrave's* case, it must needs follow that the residue of the profits must be the executor's, he paying the rent out of his own purse, as that case resolves in consequence, *viz.* that he shall be sued for it in the *Debet*, and in the *Detinet* only as for the rent due before the death of the testator. Thus though he have the lease as executor, yet part of the profits are merely his own, not as executor.

Co. lib. 5. f. 31.
b.

And looking back upon this case, we may discern a necessity sometimes of the executor's paying with his own money for his testator's debt: as where the testator being to pay a rent at *Michaelmas* or our *Lady-day*, he dies a day or two before, or to put it more clearly, a day or two after the feast, not leaving any goods to pay the rent, other than the future profits of the lease. Here, unless that executor will forfeit the lease, he must lay out of his own money.

Now, if in this and other like cases he could not do this until he had under seal, or by act in the court spiritual, an assent of the ordinary, it would be an extraordinary trouble to executors.

I find also *tempore Hen. 7.* another mean of altering property, to wit, where a *Fieri facias* comes to the sheriff to sell or levy a debt of the testator's goods: now, saith the book, may the executor buy these goods of the sheriff as well as another; and if he do, the property which he had as executor shall be turned into a property *in jure proprio*.

If

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If an executor amongst his testator's goods find and take some not his, and after, these being claimed by the owner, who left him in the custody of the testator, the executor not crediting the claim, still keeps them, and the owner thereupon recovers damages in an action of trespass, or of trover and conversion; now (and so in all other like cases) are these goods become the trespassor's in property, because he hath paid for them: therefore it is not strange, if in like manner an executor, paying out of his own purse for or in lieu of the testator's goods, have so much of them (where no certainty) changed in property, and become his own. This is but put as an instance understood with the exceptions and cautions precedent.

20 H. 7. Kclw.
Ca. 58.

C H A P. VIII.

Of some cases and questions between the executor and the heir.

21 H. 6. 30. If other goods taken among them, he is excused.

21 H. 7. 25.
Vide Lib. intr.
640. It is so pleaded.

THE executor may in convenient time after the testator's death enter into the house descended to the heir, for the removing and taking away of the goods, so as the door be open, or at least the key be in the door: and this I understand of the door of each room. For although the door of entrance into hall and parlour be open, the executor cannot by that justify the breaking open of the door of any chamber to take goods there, but only may take those in the rooms which be open. And this is proved,

proved, as to me it seems, by the case of the chest with evidences, which, saith the book, the executor may take and put out the deeds, delivering them to the heir, viz. the chest being unlocked, as I understand it. Now a chamber or other room within a house locked is an inclosure of better respect than a chest. But if the goods be not removed within convenient time, the heir may distrain them as *damage feasant*.

43 E. 3. 24.
Bro. 145. makes a Quæ. if it be locked.
Plow. Com. 280.
43 Ed. 3. 2.
10 Ed. 4, 5, 6.

Where the testator recovers land and damages, or a deed and damages, he dying before execution, the heir shall have execution for the land or deed, and the executor for the damages: but *temp. Edward 4.* it is said, that until the heir sue a *Scire facias*, the executor cannot sue execution for the damages.

Of the deed, execution first.

If a creditor be made executor by his debtor, and pay himself part out of the goods, he cannot sue the heir for the rest, because the debt cannot be apportioned; but otherwise he may, saith the book: yet *Quære*, if he do take upon him the executorship, and have goods sufficient to pay all.

12 H. 4:

If a debt be recovered against one who dieth before execution sued, leaving goods sufficient to satisfy; now shall not the land descended to the heir be charged therewith, nor by like reason any land conveyed after judgment.

7 H. 4. f. 31.
See Bro. Ex. 124.

See a good difference, where land is conveyed upon condition of payment to the vendor, his heirs or assigns, and he died before the time, and where it is to be paid to the vendee, his heirs or assigns, and he dieth: in the first case payment shall be to the executors, but not in the other.

Co. 1. 3. f. 90, 91.
To like purpose see more,
Littl. f. 77. b.
2 El. Dyer 281.
Plow Com. 291.
21 H. 7. 4.

What

The Office of an Executor.

What things pertain to the heir, and what to the executor, is before shewed. As for *Fro-wick's* opinion, that where goods be mortgaged upon condition, that if the heir or executor pay &c. here if the heir make payment, he should have the goods, I see not, for my part, how that can be.

A Directory for the following chapter.

- A. *All (as but one) represent the testator's person, and must join and be joined in suit, & e contra.*
 - B. *Where one alone must answer suit, and how.*
 - C. *When they differ in plea, the best shall be taken, but one may confess alone.*
 - D. *One as well as all, may give assent, or release the whole.*
 - E. *One cannot give, nor release to another, nor divide.*
 - F. *The possession of one is the possession of all, to what purpose.*
 - G. *If the survivor die intestate, the testator is intestate, though the other executor left an executor.*
 - H. *Executor included, in the person of the testator, and represents it, is his assign; all one, & e contra.*
 - I. *What change by death of the testator, touching proceeding in suit.*
 - K. *Proceed to or in execution; where without Scire facias.*
 - M. *Whether the executor stand in his own quality, or his testator's.*
 - N. *Where one alone may sue,*
- O. *In*

- O. In suit for them, such as will not join shall be severed, and the other may sue and prosecute alone: Consequents inde.
- P. Death of one executor, plaintiff or defendant, where abates writ.

C H A P. XI.

How executors stand between themselves, and in representation of, or relation to the testator, as his assignee or deputy, or as the same person with him; and where and to what purpose, as other persons.

First, All of them do represent the person of the testator, and therefore must they all join in suit against others, and in suit by others they must be all made defendants, or at least so many of them as do administer: for though the executors themselves must take notice by the *will* how many executors there be, and must frame their suit accordingly; creditors and strangers need not take notice of any more than do administer, and execute the office of executors. For this reason, as I take it, in the time of King *Edward* the third, where two executors were of a term, and the reversion was granted by fine, mentioning but one termor, and thereupon a *Quid juris clamat* accordingly brought against that one executor; this was held good enough, though the other executor was not named in the suit: belike, because that one (who indeed was the testator's wife) did only occupy the land, and take the profits thereof; for

Are as one person; therefore cannot plead several pleas in abatement.

37 H. 6. 17.

39 H. 6. 44.

38 E. 3. 9.

Bro. Ex. 13.

Bro. Ex. 20, 21.

Therefore one executor sued, if he pleads that there is another executor not sued, must plead, that he did administer.

9 H. 6. 44.

Bro. 13.

33 H. 6. 38.

Bro. 20.

32 E. 3.

Quid juris clamat 5.

for else, since all the executors do represent the testator's person, all must have been named. Therefore did the judges resolve in the time of *Hen. 4.* that where a lessee for years made two executors, and one of them was distrained by the lord for rent, who avowed upon the lessor; that executor shall have aid of his fellow-executor, to the end that both might have aid of the lessor, which one alone could not. And upon this reason, *viz.* that the executors represent the person of their testator as one person, (for so speaks the parliament) it was enacted in the time of *Edward* the third, that the executors, though never so many, shall have but one esfoyn, either before appearance or after, because their testator, whose person they represent, could have no more.

† It is farther also enacted by the said statute, that where two or three executors or more be, they being sued in an action of debt, though all do not appear, yet such one of them or more as doth or do appear at the grand distress, shall answer alone without his or their companions. And this statute hath been taken by equity in three respects. *9 Ed. 3. stat. 1. c. 3.*

First, touching the persons; that it shall extend not to executors only, but also to executors of executors, yea, to administrators also; though the statutes speak only of executors.

Se-

13 H. 4.
Aid, 186.

They shall have but one esfoyn among them all before appearance, and another after.

A.

Ed. 3. c. 3.
B.

But not if he appear at the summons, 1 E. 4. 1. 14 H. 4. f. 11. But the plaintiff must declare against all. He need not, but

he may admit another to appear and plead, after 7 H. 4. 12. But process must be continued against all. 7 H. 6. 35. Executors of executors by equity.

30 H. 6. 45.
Bro Ex 9.

28 H. 6. f. 4.
14 H. 4. 23, 24.
So negatively.

22 H. 6. f. 1.

28 H. 6. f. 4.

3 H. 6. 35. a.

39 E. 3. 5.

There it is not meely as executors; it is out of the stat. 11 H.

4. 63. as if in Deb. & det.

* If Judgment pass for plaintiff, he shall have judgment and execution, against them that have pleaded, and against the others named in the writ, of the testator's goods, as well as if they had all pleaded.

Secondly, touching the action; whereas the statute speaks only of the action of debt, it is taken by equity to extend to other actions, as the writ † *De rationabili parte bonorum*, and *de-tinue*: yet perhaps the later action will be said not to be maintainable against executors for their testator's act, but for their own only. But we are not yet come so far as to determine what is maintainable, but whether, before all the executors do appear, he or they which have appeared shall be put to answer; and so to bring it to decision, whether the action be maintainable or not. I think also that in the action of covenant, and all other actions against executors as executors, he which appeareth must answer without his companions, though the greater opinion in the *Quadragesimes* were contrary touching the action of covenant. But as for the *Subpœna* against the executors, which is to make them to answer to a suit in equity, that hath been *temp. E. 4.* taken to be out of the reach and intent of the statute. So also of the *Latitat* in the King's Bench, as was held in the same King's time; except all the executors, making up the whole representative body of the testator, be in the custody of the marshal, one or more of them who are there shall not be in-

H forced

B.
Cont. 47 E. 3.
22. So 7 E. 4.
20, 21. 3 H 4.
20. In Sci. fac.
upon a pardon
by a defendant
outlawed at the
suit.
47 E. 3. 22,
Only Fenold in
the affirmative.
8 Ed. 4. 5.
9 E. 4. 12. 13.
B.
20 vel 21 Jac.
Regis.

† The writ of *rationabili parte bonorum* lieth against the executors, by the wife, or sons, or daughters of the deceased respectively, for their respective shares of the goods, after debts paid and funerals performed; which is by common law, *viz.* one third part for the wife, another for sons and daughters, the third for the executors; but the writs rehearse the customs of the counties, F. N. B. Eng 270.

forced to answer: and so was it also lately held in the King's Bench where Master Justice *Houghton*, gave an excellent reason that this case is out of the said statute, *viz.* for that this writ doth not mention any debt, or name the defendants executors.

B.

1 E. 4. 1.

40 E. 3. 1.

B.

11 H. 4. 63.

C.

Or if but one appear, 28 H. 6. f.

364. judgment against all

See 9 E. 4. 12.

13. Where

B. who is not executor, is jointly sued with

A. and B. confessed, 21 H. 7.

25. Yet 7 E. 4.

7. they may sever in pleas not dilatory.

Thirdly, and lastly, That statute is extended by equity to other writs or process; for where the statute speaks only of the grand distress, and the executors appearing thereupon; it hath been many times ruled, that when he or they appear upon the attachment, *Capias* or *Exigent*, answer must be, though the rest appear not; for so the word *Distress* is taken for all compulsory means, or enforcement of appearance. But where the statute reacheth not, *viz.* when the process is determined against one or more as by outlawry, &c. there the rest must answer by the rules of the common law; except it be in the case of husband and wife executors; for there the wife cannot answer without her husband, nor doubtless can he without her, where she, and not he is executor; but where both be executors, there he may answer without her, but not she without him. When executors as defendants have appeared, if any one of them will confess the action, this binds and concludes the rest; but if one will plead one plea, and the other another, that (say some) shall be received which is best for the testator's state: so where they sue, such as will not prosecute shall

C.

7 H. 6. f. 6. per Cottessmore.

If they recover, and one of them

prays a Cap. ad sat. and the other

a Fieri fac. the first as best, shall

be granted, 3 H. 4. 10.

Bro. 44. So where the defendant is outlawed at the suit of

two executors, and upon the

Scire facias after

his pardon but one appears. 21 H. 7. 25. 9 E. 4. 12, 14.

be † severed, and the rest without them may proceed; and in like manner where they pray to be received to defend their term, and one of them after makes default, it shall not be the default of all; but the rest, or he, if it be but one who appears, shall be received to uphold the defence of the term.

Thirdly, So where they plead a release to the testator or themselves, one after making default; this shall not be, nor make a total default in the executors, to induce a judgment or condemnation against them. Yet in truth, each executor hath the whole of the testator's goods and chattels, be they real or personal, and each may sell or give the whole. One of them can-^{21 E. 3. 13.} not give nor release to the other his interest; ^{27 H. 8. 21, 22.} and if he do, it is void, and he who releaseth, ^{D. E-} shall have still as much interest as he to whom he releaseth, because each had the whole before.

Upon this reason long since, where one of the two executors released but his part of a debt, ^{C.} it was held that the whole was discharged. ^{If an horse come to four executors, each hath an horse, and yet all four have but one} And so, if one executor grant his part of the testator's goods, all passeth, and nothing is left to the other; for that each hath the whole, and there be no parts or moieties between executors. Therefore also, though a lease for 1000 years of 1000 acres of land come to two executors or more, no partition or division can be made between ^{E.} them,

H 2

them,

† Where one executor will not prosecute with the rest, there is a judgment of severance after default on summons, viz. Ideo confid. est quod præd. A. sequatur solus sine ipsis T et R. versus præd. W. de placito præd. Vide Rast. Ent. p. 330. tit. Exec. in Severance.

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them, because it is not between them as between joint lessees of land, where each hath but a moiety in interest, though possession of or thro' the whole. Amongst executors each hath the whole, and therefore if he grant his part, he grants the whole. But one executor may demise or grant the moiety of the land for the whole term, and so may the other do; and this way they may settle in friends or others trusted for them, a moiety for each, either in several or undivided: but one of them cannot make a lease to the other of any part, for he had the whole, nor can one sue the other as executor. Yet if the testator devise to one of his executors all his goods, after such debts and legacies satisfied, there, after those satisfied, the executor may take the goods, and maintain an action of trespass against the other executor, if he take them from him, and consequently an action of *Detinue*, for keeping or detaining them: but this is as legatee, his own assent perfecting the legacy.

6 H. 7. 5.

The possession of one executor is the possession of all the rest. so as if one appearing to a suit, and the other making default in whose hands all the goods be which are not administered; if, I say, here he that appears pleads that he hath nothing in his hands, this shall be found against him; for whatsoever any of the co-executors hath, he also hath, and is in his possession; and so shall the creditor recover, and have judgment to be satisfied out of the testator's goods, as in his hands. And therefore if goods be taken from one, all may maintain an action of trespass thereupon; for the possession of one is

14 H. 4. 12.

Bro. 12.

F.

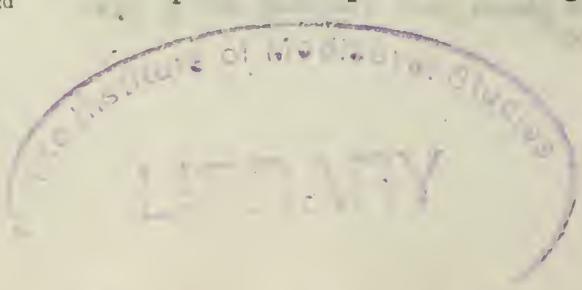
All must sue,

19 H. 6. 65.

Cont. 24 E. 3.

26.

It may be in his name only from whom taken, nor need he be named executor.



is the possession of all. But the possession of one shall not be so the possession of all, as to charge the others own goods, whereof more elsewhere.

Bro. Exe. 31.
39 H. 6. 45.
F.

Where two executors be made, the one making a *will* and executors, and dying, if the other die after intestate; now shall not the executor of him who first died be executor to the first testator, but he is dead intestate, because the surviving executor is so dead, and in him the executorship was wholly and solely settled by the death of his fellow before him. So administration *de bonis non admin.* shall be committed.

G.
38 H. 8.
Bro. Exe. 149.
39 H. 6. 45.

The executors, or executor if but one, so represents the person of the testator, that he is in law his assignee by the very making of him executor: so as if one covenant to make a lease to *J. S.* and his assigns by such a time, and *J. S.* dieth before that time, and before the lease made; now must the lease be made to his executors as his assignees, representing his person: so also in a condition to pay the feoffor or his assignee: yet a lease to *A.* and his assigns during the life of *B.* shall not go to the executors of *A.* So where in a general pardon by parliament there is an exception of persons outlawed after judgment, the person so outlawed shall satisfy the creditor who hath outlawed him. If the outlaw die before this done, his executor, as representing his person, may make satisfaction, and so make the benefit or the pardon to extend to his testator, for saving his goods, as if himself had satisfied his creditor, though he left him unsatisfied when he left the world, & *diem clausit extremum.* Yet where *A.* sold land to *B.* upon *Proviso*, that if he payed to *B.* his heirs or assigns, &c. *B.* died, *A.* payed at the day

Co. lib. 5. f. 97.
H.
Chapman & Dalton's case,
Plow. 286.

Sir Edward *hitton's* case, lib. 6.
79. b.
Co. lib. 2. f. 80.
A.
So where the stat. of W. 1. gives time for prof. to him whose goods were wrested, his executors may do it, if he die before the time.
Co. lib. 5. 107. b.
Co. lib. 6. f. o.

Also executors may have restitution for stolen

goods, and a writ
of error; yet the
statute speaks
but of the party.

A.

2 El. Dy. 180.
Cont. where to
A. the feoffor,
his heir or assign.
Co. lib. 5. f. 97.
2 El. Dy. 183.
101.

23 H. 8. c. 3.

H.

25 H. 8. 16.

M. 15 & 16.
Eliz.

L.

34 Eliz. vel cir-
citer, Titherly
and Lexeor,
Walsh. in Ban.
Rez.

26 H. 8. Bro.
stat. Merchant,
43.

K.

2 R. 3. 8.

H. 1.

35 H. 7. 14.

F.

to his executor, and it was doubted that it was not good; for the word assignee could not reach to him, being no assignee of the land. And where the executor brought an action of account upon a receipt by the hands of the testator, the defendant could not be admitted to wage his law; for that this was held a receipt *per auter mains*: yet it is clear, that if one by bond or covenant tie himself to pay such a sum at such a day, not mentioning his executor at all; yet is the executor bound, as included in the name or person of the testator. And where the statute of 23 *Hen. 8.* gives the writ of attain (in the course there mentioned) against the party that had judgment, it lieth against the executor, if he be dead; but therefore another reason is given. Where a man was bound that he would not sue upon such a bond, and he died, and his executor sued; this was held to be no forfeiture of the bond. So where one was bound to pay ten pounds within a month after request made to him, and he dieth before request; it sufficed not to make it to the executor, as *Manwood* said. It was likewise held, that the warrant of attorney put in for the plaintiff in debt, it sufficeth not for his executor to bring a *Scire facias* upon the judgment. And if executors sue execution upon a statute in the name of a conusee, as if he were alive, this is void, and they may sue out a new extent; and this they may do without any *Scire facias*, as well as the conusee might if he had been alive. But by *Huffsey*, Justice, if the conusor in a statute-staple be returned dead by the sheriff upon the extent, a *Scire facias* must be sued out before extent proceed; and upon a judgment had, if the recoverer

voverer die before execution, his executor cannot, as himself might, sue out execution without a *Scire facias*, as is there said. Yet if after a *Capias ad sat.* awarded, the plaintiff die before it be executed, the sheriff may proceed to the taking of the party, and is not subject to any action of false imprisonment: nay, if he suffer him to escape, he is chargeable, as *temp. Elizabeth* it was resolved upon the motion of *Ander-son*; but withal it was held, that relief might be by *Audita Querela*.

Like resolution was in the King's Bench, after some doubt by *Wray* and the other judges, where the defendant died after a *Fieri facias* awarded, and before it was executed; that the sheriff might proceed upon the goods in the hands of the executors.

But if the defendant in an action of debt upon a bond plead a tender at the time and place of payment, and tenders the money in court, where it rests, and then he dies; now shall not the plaintiff have this money because the property thereof is changed, and become the executor's, as was held in the Common Pleas; but he is put to a new suit against the executor.

Yet where judgment is once given in a writ of partition for a termor, or in a writ of account; if the plaintiff die before the second judgment (needful in both cases,) the executor is not put to a new suit, but may proceed by *Scire facias* upon the former judgment, as the *L. Ander-son* held, upon the motion of *Fenner*, Serjeant. Though before we found the executor not in points penal all one with the testator; yet in points beneficial, the testator includes him in some cases: as where an abbot granted to his

15 E. 3. Respon.
1. con upon a
stat. Merchant.
K.
Cont. Nat. Br.
267. upon a
Recog.

I.
H.
30 El. Rot. 31,
in Ban. Reg.

9 H. 6. 57. b.
6 H. 7. 6.
31 & 32. El.
Moffe & How.
Hill. 11 Jac.
Commin &
Bradlin.
1 Leon. 304.
29 Car. 2. c. 3.
f. 16.

1 Sid. 271.
Baile & Bun-
ning, Qu. not-
withstanding the
stat. of Car. 2.
if the goods are
not bound as to
the party him-
self from the
teste of the ex-
ecution, the stat.
being made for
the benefit of
strangers,
2 Vent. 218.
31 El. vel circi-
ter.

I.
Pasch. 28.

lessee to take estovers in another's ground, it was held that his executor, though not named, should enjoy this during the term, as well as himself should have done. And whereas the statute of 23 Hen. 8. *ch.* 15. gives costs to a defendant against a plaintiff suing for a wrong, or breach of promise, or the like, done to the plaintiff, against whom it passeth by verdict or nonsuit; it hath been resolved, that an executor suing upon such wrong or breach of contract to his testator made, should not pay costs, because he is another person than the testator; and so it is usual in experience. But if in suit the attorney of the executor misbehave himself towards him, and for this the executor sueth him; here, if it pass against him in manner as aforesaid, he shall pay costs, because this was a suit for a wrong done to himself.

If *A.* recovers a debt as executor of *J. S.* and makes *B.* his executor, and dies before execution sued; *B.* is not put to a new suit, but may have execution upon that judgment. But if *A.* or *B.* died intestate, now could none as administrator to either of them, nor as administrator of *J. S.* have execution of this judgment; for the former hath no interest in any thing-pertaining to *J. S.* and the later cometh to title above the judgment, *viz.* as immediate administrator to *J. S.* who is now dead intestate, and derives no title from the executor who recovered.

If a conusee have a certificate into the *Chancery* upon a statute, and then dies before extent taken out; his executor is put to a new certificate, and for obtaining of it must make affidavit that no extent hath yet been taken out.

Trin. 36 El. in
Ba. Reg.
H. M.

Pat. 41 Eliz. in
Com. Ban.

H.
28 H. 8.

2 H. Dy. 110.
1.

If an alien join with his wife who is executor in a suit for debt, and it cometh to issue, he shall not have trial *per medietatem alienig.* or *linguæ*, as should be if he otherwise were party to a trial; as was held in the case of Doctor *Ju-lio*. Yet if a nobleman sue as executor to another not noble, he shall for his non-suit be amerced five pounds, as if he sued in his own right; as was conceived 21 *E.* 4. 77. By the same rule and reason, doubtless, a nobleman sued as executor shall not be arrested, nor shall any *Capias* be awarded against him for not appearing. And if any trial shall be of any issue, there shall be two knights of the jury, as in other cases where a peer is party. Likewise where the wife is to have her convenient apparel, whereof the executor must not bereave her; if she be a noblewoman, it shall be answerable to her degree.

M.

If one executor only sell goods of the testator, he alone may maintain an action of debt for the money. So if goods be taken out of the possession of one executor, he alone may maintain an action, and that without naming himself executor.

A.
38 E. 3. f. 8.
N.

Some touch hath been before of summons and severance, whereunto be this added: If one executor will not or cannot conjoin in suit with the other, so as he is summoned and severed; now by his death after the suit is not abated, 16 *Ed.* 2. *Fitz.* 111. Yet if he live till judgment, he may sue execution, say other books, 13 *Ed.* 3. *Fitz. Exec.* 9. 11 *R.* 2. *Priviledge* 2. Yet *Quer.* of that, for he cannot acknowledge satisfaction, as hath been since resolved, *Mich.* 14 and 15 *Eliz.* *Dy.* 319. And the reason thereof

P.
O.
3 H. 7.
I
& 5 E. 2.
Fitz. pro. 802.
Cont. 38 E. 3. 13.
& 20 E. 3. tit.
Account, 78.

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thereof being, because he is no party to the judgment ; by the same reason can he not sue execution upon it ; for how can he have execution, for whom there is no judgment given ? Now the recovery is only in the name of the other executor. Yea, by the said last book it seems that after judgment had, he cannot release the debt, because it is now altered in nature, and turned *in rem judicatam* ; though at any time before judgment he might have released it, as both that last book saith, and the two precedent, *temp. Ed. 3. & Rich. 2.* Yea, in an action of account, after judgment had that the defendant shall account, the release of him severed is a good discharge to the defendant ; as was resolved 48 *Ed. 3. 14, 15.* But this is not a plenary Judgment, for nothing is recovered thereby ; but another judgment is to be had after the account, which may be against the plaintiff, so as this release came before any debt or duty adjudged. What if the defendant be had in execution at the suit of the executor, who prosecutes it and escapeth ? Whether may the severed executor discharge the sheriff or gaoler by a release ? I think he may not.

By that above it is, plain that if any one of the executors plaintiffs die, the writ is abated ; only where he so dying was before severed. Opinions have been different, as above appears. so also is it if one of the defendants executors die. Yea, if the plaintiff creditor sue *A. B. and C.* as executors, where only *A. and B.* are executors, there by the death of *C.* the writ abates, or falls to the ground : yet *A. and B.* (as I think) might have pleaded in abatement, that they only were executors, traversing that *C.*

2 H. 4. f. 14.

P.

9 E. 4. 12. Bro.

34.

C. was executor: but the book doth not so resolve. See 46 *Eliz.* 3. fol. 9, 10.

As *A.* and *B.* above might admit that writ against them and *C.* so if the writ or suit had been against *A.* only, and he so admit it, not pleading in abatement, the recovery against him alone is good. 9 *E.* 4. 12.

One that is outlawed, or attainted in his own person, may yet sue as executor, because this suit is in another's right, viz. the testator's but he that is excommunicate cannot proceed in suit as executor, because none can converse with him without being excommunicate, as a book says. Yet doth not this excommunication pleaded abate or overthrow the suit, but make that the defendant may stay from answering his suit until the plaintiff be absolved and discharged from his excommunication,

A.

Outlaw may sue in autre droit as executor, &c. Co. Lit. 128.
21 H. 6. 30.
M.
21 E. 4. 49. 69.
42 E. 4. 13, 14.
H. 6. 14, 15.
Co. Lit. 134.

C H A P. X.

Of the possession of executors, or their actual having.

1. *What shall be said so to come to their hands as to charge them.*
2. *What shall be such a getting or going from them as to excuse them.*

WE have before considered what things shall come to executors, and, being come, shall be *Assets* in their hands. Now, for that it is said in *Reedes's* case, that an executor shall not be charged with or in respect of any other goods than those which come to his hands after

Co. lib. 5. 33. b.
34. a.

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after his taking upon him the charge of the executorship, let us now examine what shall be said and accounted such a full and compleat coming to the hands of executors, as shall make them within the reach and charge of creditors and legatees, *viz.* for the payment of debts and legacies. As touching debts due to the testator, it hath been before shewed, that until judgment and execution had they be not *Assets* in the executor's hands. Now then as touching other goods or chattels possessory, which are of two kinds, *viz.* real and personal, let us put the case thus.

The testator at the time of his death hath a stock of sheep in *Cumberland*, corn in the barn in *Cornwall*, bullocks in *Wales*, fat oxen in *Buck. shire*, money, household-stuff and plate in *London*, a lease for years, in *Norfolk*, and his executor dwells at *Coventry*, *viz.* far from all these places; what kind of possession shall the law judge the executor to have in every of these instantly upon the testator's death, and before he come where any of the things be, either to see or seise upon them? In all the particulars above mentioned the law is all one, except the case of the lease for years; which if it be of land, (as is most usual) then, because it is a settled and immoveable thing, the law doth not reach to it the foot of the executor, to put him in actual possession, (for *Possessio est quasi pedis positio*) until himself or some for him do actually enter thereupon. Nor indeed need the law help or supply the want of actual possession in this case, as in the case of moveables; since land cannot be carried away as goods may, and therefore is not subject to purloining or embezzlement as moveables

Perk. 6. b.

ables are. But if the lease for years where of tithes, the executor, though in never so remote a place from them, shall be instantly upon the setting out thereof in actual possession of them, so as he may maintain an action of trespass against any stranger which shall take the tithes set out, though he nor any for him did ever before possess any of the said tithes, or came near unto them. But if the case were of a lease for years of a rectory, consisting not only of tithes, but also of glebe-lands, into which entry may be made, as also livery of seisin in it; then it may perhaps be some question, whether such an actual possession in tithes shall be given by the law to an executor neglecting to enter, or not entering into the glebe-land. And so I leave the consideration of chattels real.

45 E. 3. 17.
21 H. 6. 43.

Touching things personal, in which the executor hath such an actual possession presently upon the testator's death, as that he may maintain an action of trespass against any stranger taking them away, or spoiling them, though he nor any for him ever came near them; whether yet this shall be such a possession in the executors, and such a coming of these goods to their hands, as to charge them with payment of debts and legacies, yea to make their own goods liable instead of these, is a point worthy of consideration.

Co. lib. 5. 9 E.
4. 50. 1 low.
Com. 281.
32 H. 6. 13.
14 H. 8. 22.

And, doubtless, this thoroughly sifted will prove a case mischievous whether way soever the law be taken. For first, it must be admitted, that without the executor's laying his hands actually and particularly upon the goods in the house or fields of the testator, whither the executor hath resorted, he shall be said so in possession.

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session as to stand liable unto the creditors, so far as they extend in value, though, after, others purloin or embezzle them. Now then, if distance of place shall make difference, where shall be the bound and limit of that distance? And if the executor may come after a stranger's taking or possessing of the goods, it is mischievous to creditors.

On the other side, if it shall be laid upon the executors to answer for all the goods whereof the testator died possessed, it will be mischievous for them, and deter them from taking executorship upon them; since much purloining may be even of money, jewels and goods, by servants and others about the testator, or where these things be. I think therefore, that if without any fraud, collusion, or voluntary conniving on the part of the executors, they be prevented by others of laying hold on the testator's goods, so as that they may dispose of them, especially if it cannot be known by whom they are so purloined and embezzled, or if they be persons fled or insolvent; that then they shall not stand upon their score, as goods come to their hands, in respect whereof creditors or legatees shall draw so much from them even out of their own goods, as in other cases where they have no such excuse.

13 H. 6. c. 1.
33 H. 6. c. 1.

And of this mind I the rather am, because I find the whole realm in parliament taking notice of such prevention of executors coming to the goods of their testator, by the wrongful act and embezzlement of others, without any default in themselves. And in this case the parliament hath given special remedy, *viz.* that writs shall be directed to sheriffs, to make open proclamation

tion for the appearance of the parties delinquent in the King's Bench at the day limited; and in default thereof they shall be atrainted there of felony, the writ being returned, executed, *viz.* Proclamation made. But note, that this proclamation is to be made two market days, within twelve days next after the delivery of the writ, and the last proclamation must be fifteen days before the day of appearance. And these proclamations must be made in such cities, (boroughs, or places, saith the statute) not expressing what is meant by the word *such*, and therefore meaning doubtless those in which the act of offence is committed. So that if the fact be not committed within the limits of some city, borough, or market town, no remedy is to be had by the statute; for that the proclamation is to be made upon market days in the place where, &c. Now besides, other places, even some boroughs, *viz.* towns sending burgessees to the parliament, have no market, and so are no places within the act. Also two executors must require this writ; therefore where there is but one executor, no relief is given by this law, for it is penal, making it felony, and therefore shall not be extended by equity beyond the words. Lastly, it extends but to the executors of lords and persons of good degree, and only to the trespassing servants of such persons, not to other strangers, purloining the goods. But now who shall be said to be persons of good degree, not being lords, I will not much labour to decide; the rather, because I have not heard, nor read, to my remembrance, of any action brought upon this statute: but I think that good degree, must stay either at a knight, being

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ing the lowest dignity, or at a gentleman, being a degree of worship, as elsewhere is shewed, and not stoop any lower.

And the said statute seems in some sort to imply an opinion this way which I incline to; in that it expresseth his purloining to be an impediment of the execution of the *will*, whereas if the executors shall answer and make good to creditors and legatees out of their own estate and goods, for these embezzled, the execution of the *will* is not hindered, but the executors are damnified in their own private value. Yet it may be said, on the other side, that some things given *in specie* by the *will*, such a piece of plate, such a furniture of a bed or chamber, such a jewel, may be purloined, so that the legatees can never have them, and consequently, the execution of the *will* be hindered, though some recompence be made by the executors: but how these legatees shall recover recompence in such cases, for that legacies are not to be recovered by suit at the common law, I must leave to the professors of the common or civil law to inform. But if the executor be of secret assent to this embezzlement, whereof even the forbearance to sue for the recovery of the things, or the value of them in damages, if known where they or the embezzlers be, is a shrewd evidence, or proof; then shall the executor be adjudged an haver of them, and so stand charged as having them: for *Pro possessore habetur qui dolo desit possidere*. And if in any case the taker by prevention from the executor, before his knowledge (perhaps) of the testator's death, or at least, before his possibility of repair to the place where the goods were, to put them in sure custody, if, I say, such actor keeps these goods from
from

from falling upon the shoulders of the executor, they shall surely fall upon himself, and make him chargeable at the creditor's suit, as an executor of his own wrong.

Of goods lost by, or gotten from executors.

But put we the case (for thereunto shall be our next step) that goods come fully into executors possession and hands, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their own estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our learning touching escapes of persons taken in execution and imprisoned; if such be rescued by alien enemies, the sheriff or gaoler shall not answer out of his own goods for this debt; otherwise, if it be done by subjects, against whom remedy is to be had by the court of justice: and so should I think it to be touching executors, *viz.* that if enemies landing (as near the sea-coast may easily and often happen) shall take away cattle or goods from an executor, hereby he shall be excused; contrariwise ordinarily, if the ereption or direption be by subjects known, and thereby actionable. Another difference I shall think may probably be taken from the rules of our learning touching bailment. If *A.* deliver goods to *B.* to keep as his own, or generally, *viz.* without any special undertaking by *B.* to keep them safely, and without any money or other valuable consideration given for the safe custody: here, if *B.* be robbed of them, he shall not make satisfaction to *A.* for them: and so if they be stolen from a servant or factor. But if they

33 H. 6. 1.
10 E. 4. 2, 3.
7 Eliz. Dy. 241.

Vide 29 Aff. p.
28. 8 E. 2. Firz.
Detin 59. 9 E.
f. 90. 13 H. 7. 4.
Co. lib. 4 f. 83.
84.

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be taken away by a known trespasser, not feloniously, some opinion hath been that the keeper shall make recompence, because he hath remedy for recompence or satisfaction from the trespasser. Yet of this later I should doubt, because *A.* himself as well as *B.* may have this action for damages against the trespasser. Now an executor is of the nature of such an one, having the custody of another man's goods; and I have seen in a manuscript entire, the writ of trespass by the executor, expressing goods of the testator in the custody of the executor to be taken from him: therefore methinks he should no otherwise be charged than *B.* to whom goods were, as above is said, delivered to be kept. For the executor haply shall have no benefit nor advantage by the executorship, all the goods not sufficing, perhaps, to pay debts and legacies, which is the state we most think of, *viz.* where goods want to pay debts and legacies; for where there wants not, the question needs not be made. Yet a servant or factor, who hath wages for his service, is not thereby made liable to satisfy for things in his custody stolen, because he hath not for this particular custody any compensation. So of an executor, if perhaps benefit might accrue to him by the executorship, as haply the discharge of a debt owing by himself, &c. Other cases there be wherein the executor will stand more clearly discharged. As if the testator left a lease for years, estate by extent, wardship, or other goods, whereto he hath but a defeasible title, and they be evicted after his death: so if he left a ship at the sea with much goods and merchandizes, which are drowned in the return, never arriving in safety: so also if he left a flock of sheep tainted with the
rot,

In custodia sua
existit.
It is so in F. N.
B. Eng. p. 193.

Not, which die shortly after him : in none of these three cases, (doubtless) shall the loss fall upon the executor. But to put a case of more doubt : what if a lease for years come to an executor subject to a condition for payment of rent, or a sum in gross, and the executor fails in payment, whether shall this loss fall upon the executor to be made good to creditors or legatees out of his own substance or not ?

To this, I must answer by this distinction, *viz.* If the executor had taken the profit of this land so long as to furnish him with money for this payment ; or if he had other goods of his testator's in his hand to supply the payment ; then it is his default that the money is not paid, Yet Quære. and he must bear the smart thereof, otherwise not ; for he is not bound to make payment out of his own goods : yet he is a sullen and unkind executor who will not so do, when as he may repay and satisfy himself by the profits thereof after. Like law, if the executor suffer a bond of a hundred pounds to be forfeit for not paying of fifty pounds, having sufficient in his hands. So also of a recognizance, statute or judgment, defeasanced upon payment of a less sum. Yea, I less doubt of all these cases, than of the forfeiture of the lease for years : for happily the executor had time to have sold the lease, and made money thereof towards the payment of debts ; the omission and neglect whereof may be imputed unto him, as a default justly occasioning recompence to be by the law required from him. But perhaps, he may excuse himself that he could not find a chapman who would give him to the value thereof. Hereunto yet reason can easily reply, that it had been

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much better to have sold it under the value, than to have lost the whole value, by exposing or abandoning it to a total forfeiture.

C H A P. XI.

How far and where an executor, having Assets, is chargeable or liable to an action.

HAVING considered what things shall come to executors, and be *Assets* in their hands for the performance of the will; let us now consider what things the executor is bound to pay, satisfy, or perform, and where not; where he is chargeable, and where not; this being admitted, that he hath *Assets*, *viz.* sufficient wherewith to perform,

Here we will consider of these parts.

1. *Of debts by specialty or record.*
2. *Of debts or duties by contract without specialty.*
3. *Debts without either contract or specialty.*
4. *Covenant by deed or specialty.*
5. *Wrongs done by the testators.*

TOUCHING debts by specialty, which are the most usual and common obligations, it will not be impertinent to give a little light touching the validity of a specialty, and the extent of it to executors. The most doubt will arise upon bills and such writings obligatory made, not by scriveners or clerks in common form,

form, but by others otherwise, for haste, or through simplicity. Thus long since we find a writing made by *A.* to *B.* *Memorandum*, that I have received of *B.* ten pounds, which I promise to pay, &c. This being sealed, and delivered, was held a good obligation by *Brian* and *Catesby*. So if the words had been only, I shall pay to *B.* ten pounds; whether such words, or the like, as *covenant* or *grant* to pay, be in the form of a bill or bond, or in an indenture or articles, it is a sufficient ground for an action of debt. And though it should be miswritten, *Wigint* for *Vigint*, or fitten for fifteen; yet shall it be favourably construed, and held a good specialty of debt, as hath been resolved in these and like cases; and so also notwithstanding false *Latin* in the obligation, or the plural number for the singular number, or words of repugnancy or non-sense; yet if there be words whereby it appears that *A.* is a debtor to *B.* and it be sealed and delivered, it is a good writing obligatory; yea, though it want the words of conclusion, *viz.* *In witness whereof*; as the Lord *Dyer* reports to have been resolved: although the contrary were held in four several Kings times before, as our books shew.

22 E. 4. 22.
19 R. 2, F. Det.
166.
9 H. 6. 7.
2 H. 4. 8.
2 El. M. 5.
9 H. 7. 16.
2 H. 4. 8.
28 H. 8.
Dyer 22.
28 H. 8.
Dy. 19 & 22.
40 E. 3. 1.
7 H. 7. 14.
8 H. 8. 36.
22 H. 6. 15.
21 E. 4. 81.
3 H. 4. 17.
11 H. 4. 76.

Now any such writing obligatory doth determine or drown any duty by contract, because specialty is of a higher nature. So as if *A.* and *B.* do bargain with *C.* to pay him a hundred pounds for corn, or other thing, and after *C.* take some such writing obligatory as aforesaid of *A.* now by this is *B.* discharged of the debt, because he stood charged only by the contract which is extinguished by the said specialty.

So reservation of
rent, grant of
annuity.

28 H. 8.

Dy. 14 & 22.

47 E. 3. 22.

32 . 6. 32.

10 H. 7. 18.

heir not bound

by note on simple

fact 30th case

in mind

No mention of
executor in the
judgment, yet
he charged.

9 H. 6. f. 11.

11 H. 3. 6. 92.

Otherwise of a
guardian in so-
cage, he is out
of the stat.

W. 2. c. 11 ut
credo.

Co. 1. 10, 103.

As for the extent and operation of these specialties to and upon executors, we must know that an executor doth so represent the person of the testator, and is so included in him, as that every bond or covenant by the testator, made for payment of money or the like, reacheth to the executor, although he be not named, *viz.* that he doth not covenant for nor bind him and his executors by express words, (and yet the heir not named is not bound, though there be never so great *Assets* or land descend unto him.)

Now touching debts upon record much need not to be said, (except of those by stat. merchant :) for to debts and damages already recovered against the testator, and to debts by recognizance, the executor's liableness is somewhat clear and conspicuous. Yet other inferior debts upon record may fitly be thought of, as issues forfeited, fines imposed by justices at *Wesim.* or at assises, quarter-sessions, commissions of sewers, or bankrupts, by stewards in leets, or the like; for all these are debts of record, which executors stand charged withal. So also if the testator were before auditors found in arrearages of account, being a bailiff or receiver; for these auditors are by statute judges of record: but if the account were made only before the party to whom the arrearage pertained, or but before one auditor only, it is out of the statute, which speaks of accounts before auditors in the plural number; therefore the executor not chargeable, because testator might wage his law in those cases, not in the former.

And whereas exception was before made of a debt by statute-merchant, it was by reason that the Lord *Brook* tells us, that if the conusor
in

in that case be returned dead, no remedy appeareth for the conusee to have execution of the goods of the conusor, but only of his lands. 36 H. 8. Br. Stat. Mer. 43. If this should be thus, it were a very mischievous case: for many bound in statutes have no lands, but leases, and goods of great value, and if by their death their goods and chattels should be set free from this statute, and the creditor without remedy, the law were defective: and it were so much the more strange in this case, because the statutes of *Burnell* and *Mercatoribus* Acton. seem to pitch principally upon goods, and to tend unto assurance between merchants, who usually are not landed men. But that the law doth give remedy in such case, as well against the goods as lands of the deceased conusor, appears by the resolution of late made in what order and precedence statutes are to be satisfied by executors, as after we shall see,

Of debts by contract without deed, as leases parcel, &c.

Contracts are of divers kinds; and we will begin with those in the reality as most worthy. If therefore one be lessee for years or for life, without any indenture or deed, (as he may be) and, his rent being behind, he dieth; now is the executor liable to the payment of this rent without any specialty, for that his testator, if he had been sued in his life-time, could not have waged his law. 21 H. 6. 1. 44 E. 3. 42. 44 E. 3. 5. 7 E. 3. 11. 14 H. 7. 4. per Keble. Vide 8 E. Dy. 247. But if the lessee for years in his life-time sell or grant away his term or lease, although he still lie at the stake for the rent to grow due after, until the lessor accept the assignee for his tenant; yet if the lessee die, M. 22 & 33 E. in Com. Bar.

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his executor shall not be charged for any rent due after the death of his testator. But what if the lessee do not alien or assign his term, but die thereof possessed, and the executor, perceiving the land not to be worth the rent, waiveth the same, yet the lessor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the executor with the rent during the term? I answer, that if he hath *Assets*, that is sufficient for payment off this and other debts, he cannot wave this lease, but shall be tied to answer this rent, though much more than the land is worth, for the taking of the lease is much of the nature of an obligation to pay money: yet because it is yearly executory, the executor may wave it, in case his testator's estate will not supply and bear that loss. But what if there be *Assets* to bear this yearly loss for some years, but not during the whole term? I think in this case the executor must pay the rent so long as these *Assets* will hold out, and then must wave the possession, giving notice to the reversioner. And this I think he may do well enough, notwithstanding his occupation of the land divers years after the testator's death, because that was not voluntary, but as of necessity: yet this I leave as a *Quere*, to be well advised of with good counsel.

Of contracts personal.

WHere the testator might wage his law, there the action lieth not against the executor, as hath been touched: therefore he is not chargeable in an action of debt upon a simple contract, as by reason of this or that,

to his testator; yet, though it were the inheritance of land which was sold, so as the sale were without deed, or though by deed, yet if no counterpart were under the hand of him to whom the sale was made. And the custom of *London* to the contrary, viz. that an action of debt should be maintained against executors upon a contract, was held void, at least no good plea against other creditors, that such a debt was recovered against the executor, or paid by him; as was towards the later end of the late Queen's time resolved, though in the beginning of her time it was a demurrer. Yea, though such a debt grew for the most necessary thing, viz. meat and drink, which bindeth even an infant to payment, yet will it not charge the executor of a man of full age. But this is meant where the contract was only by word: for where the testator putteth his seal to any deed or writing made upon such sale, this is more than a simple contract, and taketh from the vendee his waver of law, and so chargeth the executor. But if the testator seal but unto a tail or tally with scotches, expressing a debt, this is no such speciality as shall charge executors. Yet in some cases without any seal at all the executor is chargeable. But although no action of debt lieth against the executor upon such a simple contract, yet may the creditor in that case maintain an action upon the case, grounded upon the assumption implied, though not expressed, as now standeth resolved by all the judges of all the courts at *Westmin.* though heretofore there hath been much difference of opinion thereabout. And indeed, thus the executor is charged in matter for a simple contract, though not in manner of a debt, but as

41 E. 3. 13.
 15 E. 4. 25.
 Except by a Quo minus in the exchequer. So the King's debt.
 Co. l. 9. f. 98. a.
 So of accounts, except for the king. M. 32 & 33 El. in Com. Ba. by three judges, and 37. El. by all as I find in my report.
 But Co. l. 5. f. 82. b. it is contrarily reported
 3 El. Dy. 196.
 Demurrer.
 9 E. 4. 51.
 10 H. 7. 8.
 15 E. 4. 16.
 22 H. 6. 13.
 19 H. 6. 116.
 There though a common hostler or victualler trust his guest, he loseth his debt by his death.
 Co. 9. 87. b.
 12 H. 4. 23.
 But if the sum be also written on it, they are bound as by a deed. 28 H. 8.
 Dy. 2. a. Slade's case.
 Co lib. 4.
 Co. lib. 9. 17.
 1 inchon's case.

for

for breach of promise, making recompence in damages, in stead of the debt. And the chief reason for it is, because the testator could not have waged his law in this action upon the case against himself, though in debt he might. Where the testator retaineth servants in husbandry, or otherwise, and dieth, there being wages due to these so retained; the executor is liable to an action of debt for the same, by reason that the parties were compellable by statute thus to serve, and therefore the testator could not have waged his law: but in case of servants not compellable, as waiters or serving-men as we call them, no action of debt lieth against the executor for their wages, though against the testator himself it doth; for the contract is sufficient to charge him who made it. See of *Account* after.

2 H. 4. 14.

4 H. 6. 4. 8.

So 2 H. 4. f. 14.
Servitors in the
war by contract.

Where executors shall be charged, without either contract or specialty.

27 H. 6. 4.
15 E. 4. 16.
Co. lib. 9. f.
87. b.
No. Na. Br.
131. a.
He must have a
Liberate also.

27 H. 6. 4. b.
1 H. 7. 17.
2 H. 7. 8. b.
Clark of the
hamper.

WHere a prisoner oweth money to a gaoler or keeper of a prison for his diet or victuals, and dieth, his executors shall be chargeable for this debt, because it is for the commonwealth to have prisoners kept, which cannot be without affording them victuals. Also where one hath a patent or tally of the exchequer, to receive money of some customer, receiver, or other officer of the crown, and delivereth it to him, he then having money of the king's in his hands: if he pay not the same, but die, his executor, shall stand chargeable with the payment thereof. So for arrearages of account before auditors, if more than one, but this is debt of record in law.

So

So if any lord of free tenants doth levy aid of them for the marriage of his eldest daughter, and he died before she be married; she may recover this money by an action of debt against his executor: but this is by virtue of a statute. There is a president in the book of entries, of an action of debt against the executor of an heir, by which it seems that a man binding himself and his heirs, and leaving *Assets*, the heir taking the profit becomes so a debtor, that his executor shall be charged. And in the *Register* there is a writ against the executors of the guardian of the spiritualties of the archbishop of *York*, for the debt of *B.* who died intestate, and whose goods came to the hand of the said guardian, *viz.* the dean of *York*. In allowance whereof, there is a note added of the like writ brought in *K. R.* 2. his time, and that then a president was alledged of such a writ in King *Edw.* 2. his time, against the executors of an ordinary, and that they were enforced to answer unto it. So is the opinion of *Trew*, in the time of *Edward* the third. But *Ald.* opposeth him. Also the *Rationabili parte bonorum* by custom in some places is maintainable for the wife and children against the executor. But no action of account lieth against executors, except for the King. More hereof tit. *Wrong*.

10 H. 6. 24. 25.
No. Na. Br. 82,
83.
West. 1. c. 35.
Lib. Intr. 172. b.

Reg. orig. p. 141.
Cest brief fuist
en Court Anno
11 R. 2. ou-
fuist dit que ter-
mino Trin. 16
Patris Ed. tertii
avi Reg nunc,
mesne cestui
Robert de P.
fuist reponder
au tiel brief qu'
il' porta vers
executors de or-
dinary.
11 R. 2. 16 P.
2.
11 E. 4.
Fit. Ex. 77. See
Co. Lib. Intr.
564. Such acti-
ons in *Yorkshire*.

Of covenant charging executors.

WE have already touched upon covenants, in part, *viz.* where they be expressly for payment of money, shewing them to be in law, bonds, that is, writings obligatory, whereupon an action of debt may be brought as well as an action

Inter Andrews
and Elferig, cir-
citer 33 El.

action of covenant, though the words of the deed bear the sound and phrase of a covenant. Yet in some cases no action of debt lieth upon a covenant to pay money: as if *A.* covenant that his executor shall within a year, or such a time, after his death pay ten pounds to *B.* now for that no action of debt was maintainable again *A.* himself, it lieth not against his executor, but only an action of covenant; as was held in the late Queen's time. So if the covenant be conditional; as thus, that if *C.* do not pay to *B.* ten pounds, then *A.* will pay it; and so also, perhaps, if the covenant be in the disjunctive, *viz.* to do such an act, or to pay ten pounds: now if the act be not done, yet no action of debt lieth for the money, but only an action of covenant. But now let us come to the cases of meer covenants, and see which of them will charge an executor, and which not. If a lessee for years covenants to repair the buildings, or to pay the quit-rents issuing out of the land let, there is little doubt but the executor, to whom the term cometh, must as well as his testator perform that covenant, although he did not covenant for him and his executors. And yet of these cases doubt hath been: and touching the later, *viz.* of paying quit-rents, divers justices in Queen *Mary's* time were of opinion, that it was a thing so personal, that it died with the person, and did not charge the executors; nor is there any contrary opinion expressed in the book. And since that time, *viz.* towards the end of Queen *Elizabeth's* reign, in the action of covenant between the dean and canons of *Windsor* and *Hide* touching reparations, at the first, much opinion was, that only the person

CO-

Pafch. 33 El. in-
ter Bor & Au-
stine, in Com. Ba.
Quære, If both
be to be done
by the covenan-
tor. *viz.* 10 l. If
not five, such a
day. So in Fe-
not's case. But
where the lessor
did covenant to
pay the Quit-
rent, divers ju-
stices thought
the executor not
named, was not
bound, 1 & 2
P. & M. Dyer
114. Note the
Case is supra
in marg. Pafch.
38 El. in Ban.
Reg.

Co. l. 5. f. 24.

covenanting was tied to this performance ; but after it was resolved, that *that* covenant did run with the estate, and so both executor and assignee were bound to performance. But in that case it was said by *Popham*, chief justice, that if the covenant had been to do a collateral act, neither the executor nor the assignee had been tied thereby : and therefore where a lessee for years covenants within such a time to build a new house upon the land, and dies before that time expired, I doubt whether the executor be bound to perform this or not ; although it do concern the land let, so as perhaps the rent or fine was the less, in respect of this charge of new structure or buildings ; which is a great reason that the executor, though not named, should be tied to the performance. But if the covenant had been to build a house elsewhere than upon the land let, or to do any other collateral thing, not pertinent to the land let ; it is clear the executors were not bound to perform it. And yet in those cases, if there were a breach or non-performance in the testator's life-time, as that the time of performance were expired before his death, then it is clear the executors were bound to yield recompence by way of damages recoverable in an action of covenant, as both *Shelly* and *Fitzherbert* agreed : and so also did the Lord *Popham* agree in the said case of *Hide*, as I find in my own report of that case ; though in the Lord *Coke*, reporting only the point in question, that be not mentioned. Now let us consider of the case where there is no express covenant at all, so much as for the lessor himself, but only a covenant implied, or covenant in law, as we call it. As if lessee for life make

Resolved P. 39.
 Eliz. but not
 adjudged till M.
 43 & 44 Eliz.

Tr. 28 H. 8.
 Dyer 14.
 There was a
 house to be
 built upon the
 land leased ; and
 yet Baldus seem-
 ed of a contrary
 opinion.

M. 8 & 9 El.
Dy. 257. Intrat.
M. 7 & 8 Eliz.
Swanno verf.
Strangsham &
Scarles,

Tr. 22 Eliz. Rot.
459. inter Bro-
deridge and
Windfor.

a lease for years, and die within the term, so as the lessee is evicted by him in reversion and remainder. In this case it was resolved in the late Queen's time by three judges, viz, *Walsh*, *Brown* and *Dyer*, that by this covenant in law the executors were not chargeable; and in the same case, the Lord *Dyer* sets down another resolution after to the same effect. But Master Serjeant *Bendloes* reporting this later case to be of a lease made by † tenant in tail, viz. before the statute of 32 H. 8. or not warrantable by it. sets down the opinion contrarily, viz. that the action was maintainable against the executors. This may serve for instance, the like being in any other case where the lessor hath not a good and a firm title, but perhaps subject to a condition, or other eviction, so as the lessee cannot enjoy the land according to his lease.

But this must be so understood, that no eviction or breach of covenant is in the life of the testator himself; for if that be, there is no question but the executor stands chargeable: and therefore if one make a lease of land by deed wherein he hath nothing, this covenant is perhaps presently broken; and though the lessor die before an action of covenant brought, it will be maintainable against his executor, though no express covenant. This is useful to be known, though in these days there be few leases so made, without express covenant, and the executors also named. And where there is a special covenant

Nokes and Ander's case.

† By 32 H. 8. 28. Tenant in tail may by lease for 21 years, or three lives, bind the issues in tail, but not him in reversion or remainder; but several things are to be observed in making the lease.

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in exprefs words, it doth qualify the covenant implied: fo as although words of demise and grant tie the leffor to a general warranty of the title againft all men, yet it being after covenanted that the leffee fhall enjoy againft the leffor and his heirs or againft all claiming under him or his ancestors; now no eviction by or under any other title giveth caufe of action, or bindeth the leffor or his executor to make recompence.

Trin. 41 El. between Nokes & James, 4 Co. 80. 5 Co. 17.

Of Wrongs done by testators, and whether executors be liable to amends.

ALthough executors do represent the perfons of their testators; yet if the testator commit any trespass upon the goods of another, or upon his person or lands, no action lieth for this against the executor; for *Actio personalis moritur cum persona*. † So if a sheriff, gaoler or keeper of prison suffer one in execution for debt or damages to escape; though hereby the party at whose suit the execution was, be intitled to an action, viz. an action upon the case, against such officer by the common law, and by statute an action of debt; yet if he so suffering die, for that such sufferance was a wrong of the nature of a trespass, no action lieth against his executor for the same. And upon the same reason, as I presume, if one carry away his corn and hay, without setting out the tenth, although

But in equity the executor of an executor is liable for any waft or wrong done by his executor, tho' not at law a personal tort which dies with the executor. 2 Chan. Ca. 217. 41 Aff. p. 15. 40 E. 3. Fitz. Ex. 74. Co. lib. 9. f. 78. a.

† Upon an escape, debt lies not against the heir nor executors; for it is a trespass, que moritur cum persona Dyer 271 & 322. 2 Bac. Abr. 245. Show. 176. 2 Mod. 145. the

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the † treble value be recoverable against him in an action of debt; yet if he die before such recovery, the action is gone, and lieth not against his executor; no, not although the testator were a lessee for years, so as his state come to his executor.

Like law in other penal statutes: as, for arresting one at the suit of *J. S.* without his privity or assent; § or for not appearing as a witness, being served with a *Subpœna*, and having charges tendered, and many like: yea, if a lessee for years commit waste and die, no action lieth against the executor for this waste. For all these cases are within the rule of *Actio personalis moritur cum persona*. And many other like cases might be put, but these may suffice. Yet if a parson, vicar, or other spiritual or ecclesiastical person, do suffer a ruin or decay of the houses or buildings upon his such spiritual benefice or promotion, and dieth; his executors are liable, by the spiritual or ecclesiastical law, to the repairing of such spoil or decay. And because some used fraudulently to grant away their goods, so as nothing shall be left to their executors; it was enacted *temp. Elizabeth*, that such grantees of goods should be liable to the successor's suit for these dilapidations, as if they were executors.

13 El. c. 16.

† This treble value is by 2 & 3 Ed. 6. c. 13.

§ The penalty for not appearing is by 5 El. c. 9. 10. 1. and such farther recompence, &c. For cases on this statute, see Str. 510. 2 Stra. 810. 2 Lord Raym. 1528. Barnard. 92. B. 45. 2 Stra. 1150.

As

As for one other case of this nature, *viz.* where an executor wasteth the goods of his testator, or an administrator the goods of his intestate, and dieth, whether his executor be subject to an action for this, or not; I adjourn the reader to that place where I shall treat of such wasting or devastation by executors.

The executor of an executor who commits a Devastavit liable in equity. Chan. Ca. 303.

Unto this head not unfitly may be referred what before is said of actions against the executors of the debtor's heir, and the executors of the ordinary; for the specialty binding to payment reacheth not to any of these: but because their testators should have paid these debts with the goods or profits of the lands of the debtor, and did not, but retained them to themselves; therefore for this, as a wrong, are they suable, as I take it. So also by the same reason are the executors of an Administrator chargeable, where he did neither pay the debts, nor leave the goods to the next administrator, but otherwise disposed of them. Yet an executor is not chargeable in an action of detinue, nor of account, (except to the king) for the testator's detaining, and not paying or answering things received, or under his charge.

Fitz Ex. 77. I conceive no difference between this and the other cases supra.

And the reason why, after account made before auditors, and the bailiff or receiver be found in arrearages and die, that in this case his executor is chargeable, is, because the auditors are made judges by the statute *Westm. 2. cap. 11.* so this arrearage which they have judged is a debt by record. 13 *Ed. 1.*

2 H. 4. 13. He may by A. admit. Co. l. 11. f. 23. H. 6. 35. a. Con. for arrearages of an account before auditors. 11 H. 5. 64. 91, 92. 9 H. 6. 11. 13 E. 1. Co. lib. 9. f. 87. a.

But if the case be put on the other side, *viz.* that the bailiff or receiver have been found in surplusage upon his account, *viz.* that he hath laid out more in his lord's or master's business than

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his receipts amounted unto, and then his lord or master dieth; now shall not he have any action against the executors for the surplufage, because it is out of the purview of the said statute.

C H A P. IX.

Of the order and method to be used by executors in payment of debts and legacies, so as to escape a devastation or charging of their own goods.

WE have gone through and dispatched the two first proposed parts, *viz.* 1. Touching the being of executors, and the manner of their being. 2. There having, and the manner of their having. We come now to the third part, *viz.* Their doing or disposing of the testator's estate.

Now this consists principally in the issuing of money, though partly also in delivering or assenting to the execution of legacies, not being money, but other goods or chattels bequeathed.

Money is to be issued by executors four ways ordinarily.

About the funeral of the testator.

About proving his will.

In paying of debts.

In paying and satisfying of legacies peculiarly.

3 Inst. 202.

As for the first, Burials be as of necessity for two respects, *viz.* 1. Of charity to the dead that he may be christianly and seemly interred:

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2. To

2. To prevent and avoid annoiance to the living, who by the very view of the dead carcase would both be affrighted, and within a few days distasted at the nose. We know that under the law the touching of a dead carcase made a man unclean, and to need purifying: nor can we easily forget what the sisters of *Lazarus* said to our saviour touching their brother, when he had been dead three or four days, *viz.* that the taking of him then out of his grave must needs bring an noisome favour. Hereabout therefore some experience is necessary, and that not only for fees to be paid, which in *London* amounts to a considerable sum, specially for such as are to be buried within the church, but also otherwise, *viz.* for the pall or hearse-cloth, the ringing, &c. As for feasting and banqueting, it seems not to be congruent to the sadness and dolefulness of the action in hand. But howsoever that be, yet where the testator leaves not sufficient goods to pay his debts, festival expence is to be forbore, except the executor will out of kindness bear it with his own purse; for dead debtors must not feast to make their living creditors fast. I mentioned a considerable amount of funeral fees payable in *London*: and surely (to let my thoughts fall back upon it a little) it is worth consideration, whether in that kind, and especially for those who dying there are yet carried into their countries to be buried, the exaction be not either unjust altogether, or too onerously excessive: so also for much ringing, contrary to the canon made at the convocation in the first year of King *James*.

The next thing mentioned to justify and occasion expence is the proving of the will. But

It is no good custom in *London*, and against reason, that he that is not any parishoner, but passing through the parish, lies at an inn for a night, should be forced to be buried there, or to pay as if he had been buried there. *Hob. Rep.* 238. *Topfal & Ferrers. Hob. f.* 175. *S.C.* 1 *Roll. Abr.* 559. pl. 1. *S. C.*

this way a greater disbursement (except for riding charges, or by reason of opposition by a *Caveat* put in, or the like) will not stand allowable, than is prescribed by the statute made in the time of *Hen. 8.* whereby the fees of ordinaries, and their scribes, registers and officers be limited. And it is strange that these bounds have been transgressed, the rather, for that long before in the time of King *Edw. 3.* by an act of parliament it is provided, that the King's justices should, as well at the King's suit as at the parties grieved, enquire after such oppressions or extortions, for so they be called; yea, *St. Germ.* who was no stranger to the civil and canon law, as appears by his book, saith, that the ordinary ought to take nothing for the probate, if the goods suffice not for funeral and debts; but he means only that conscience is against it.

21 Hen. 8. cap. 5.

13 Ed. 3. c. 4.

Do & Stu. 1. 2. cap. 10.

Vide Vern. 143.
Harding v. Edge,
& 2 Vern. 88.
Searle v. Lane
in Mich. 1688.
Where it appears that a decree of chan. is equal to a judgment at law. Andtho' an executor cannot defend himself at law, by pleading he has no Assets ultra to satisfy the decree; yet he may defend himself by a bill in that court.

Now we come to the third occasion of disbursement, *viz.* payment of debts, which is the main part of our business. We have before seen what debts lie upon executors having *Assets* to pay them; we are now to see in what order they must pay them, as well *ut sint fidi dispensatores*, as for their own indemnity, *ne quid res sua capiat detrimenti*. To put themselves into the better order or method of handling these things, we will sort our debts into their several kinds: Thus,

They are of these three sorts, *viz.* either debts of or upon record;

Or, debts by specialty;

Or, debts without specialty.

The debts upon record may be again divided into four sorts or kinds, *viz.*

Debts

Debts to the King or the crown.
 Debts by judgment or recovery in some court of record.

Debts of recognizance.
 Debts by statute-staple, or statute-merchant.

Among these, the debts of the crown are to have the first place of precedence; so as if there be not come to the executor goods of greater value than will suffice for the satisfaction of these, he is not to pay any debt to a subject; and if he be sued for any such, he may plead in bar of this suit that his testator died thus much indebted to the King, shewing how, &c. and that he hath not goods surmounting the value of that debt. Or, if the subject's pursuit be not so by way of action, as that the executor hath day in court to plead, but be by way of suing execution, as upon statute-merchant or staple; then is the executor put to his *Audita Querela*, wherein he must set forth this matter.

M. 33 & 34.
 Eliz. the lady
 Walsingham's
 case in Com.
 Ban. & Tr.
 39. Eliz.

And there is great reason why the King's debts should thus be preferred before any subject, *viz.* for that the treasure royal is not only for sustentation and maintaining of the king's household, but also for publick services, as the wars, &c. as appears by the statute 10 *Rich. 2. cap. 1.*

Prerogative.

And therefore it is, as I conceive, that *Brañon* faith of the treasures or revenues royal, *Roborant Coronam*, they do strenthen or uphold the crown. And for the like reason, as I think, did God enact touching the possessions of the crown, that if they were given to any other than the King's own children, they should revert and come back to the crown the next jubilee, which was once in fifty years. *sed de hoc satis.* But this priority of payment of the King's debt be-

Lib. 1.

21 E. 4. 21, 22.
So must it be
pleaded M. 33
& 34 Eliz.

fore the debt of any subject, is to be understood only of debts by or upon record due to the King, and not of other debts. If any ask how the King should have any debts which shall not be of record, since by the statute 33 of King Hen. 8. chap. 30. it is enacted, that all obligations and specialties taken to the use of the King shall be of the same nature as a statute-staple: to this I answer, that there may be sums of money due to the King upon Wood-sales, or sales of tin, or other his minerals, for which no specialty is given; so also for amercements in his courts-baron or courts of his honours, which be not courts of record; the like of fines for copyhold estates there; so of the money for which strays within the King's manors or liberties are sold. Also, as the law hath lately been taken and ruled in the exchequer, even debts by contract due to any subject are by his outlawry, or attainder forfeitable to the crown. Yet neither these, nor those due to such person outlawed or attainted by bond, bill, or for arrearages of rent upon lease, are or can be any debt of record, until office thereupon found; for although the outlawry or attainder be upon record, yet doth it not appear by any record, before office found, that any such debt was due to the person outlawed or attainted. Thus are not these debts to the crown to have priority of payment before the subject's debts, though the King's debts of record are so to have. So that if a subject to whom the testator was indebted by specialty sue for this debt, the executor must plead, that the testator died indebted thus much to the King by record, more than which he left not goods to satisfy; if the truth
of

Debts by contract forfeitable by outlawry or attainder.

And must plead the record in certain, as was

of the case be so : for if there be sufficient to satisfy both, then the subject creditor is not to stay for his debt till the king's debt be levied. And if the subject creditor sue execution upon a statute, so that the executor hath no day in court to plead this debt to the King, then is the executor put to an *Audita Querela*, wherein he must set forth the matter, and so provide for his own indemnity. But what shall we say of arrearages of rent due to the King? Surely where it is a fee-farm rent, or other rent of inheritance, I see not how it can come under the title of debt, since for it no action of debt is maintainable so long as the state continueth in him to whom it grew due; and I find that the Lord *Dyer*, *M. 14. Eliz.* said, that the King could but only distrain for his rents, and not otherwise levy them of lands and goods; and that the King by his prerogative may distrain in any other lands of his tenant, our books tell us, but no more. Yet I know it hath been otherwise done of late in the *Exchequer*, which if it have been the antient and frequent use of the *Exchequer* it will stand at law, though unknown to the Lord *Dyer*. Now rent upon a lease for years differeth from the other, since for the arrears thereof an action of debt lieth. But how can either of these be debts of record when the non-payment may be either in the court of *Exchequer*, or to the receiver general or particular? And how then can there be any certain record of the non payment, so as to make any certain debt upon record: we know statutes have been made to make the lands of receivers subject to sale, for satisfaction to the crown; and besides that, some antient patents direct the

held in the case of the Lady Walsingham, *M. 33 & 34 Eliz.* But it sufficeth to say, by a record of the exchequer, as was held *Tr. 39 Eliz. in Ban. Reg.*

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payment of fee-farms into the hands of sheriffs. The stat. of *Westm.* 1. *cap.* 19. provides remedy for the King against sheriffs not answering the debts of the crown by them received: so as the King's farmer or debtor may have paid his rent or other debt, and the crown have not yet received it. Of fines and amerciaments in the King's courts of record, there is no doubt but they are debts of record.

Come we now to the debts of subjects, and first those of record. Touching which I shall not be able to hold so good a method, and so well to handle things by parts, as I would; for that the parts so stand in competition one with another for precedency, as that they must of necessity thereabout conflict and interplead one with the other, and contest one against the other: yet for the reader's better ease, and ability to find out that which may concern him in his particular case, I will, in the best sort I can, place them in several rooms or stations. First, considering how it shall stand between one judgment and another, had either against the executor or testator. Secondly, how between judgments and statutes or recognizances. Thirdly, how between recognizances and statutes. Fourthly, how between one recognizance and another. Fifthly, how between one statute and another. Adding to each some observations incident.

Now, next to the debts of the crown, are judgments or debts recovered against the testator to have priority or precedency in payment, as being of an higher nature or more dignity than any other: for that statutes and recognizances, though they make debts upon record,
yet

yet are they begotten but by voluntary consent of parties ; whereas in every judgment there hath been a course and work of justice against the will of the defendant, as is presumed, and this in a court of justice, and the records of such judgments are entered in publick rolls, not kept or carried in pockets or boxes, as statutes, and, until inrolment, recognizances are. Therefore executors must take heed that judgments against their testators, (before debts any other way) if they have not sufficient for both, be first satisfied, least they draw the burthen of this debt upon their own backs. Now their way to help themselves, being sued or pursued for other debts, is the same before delivered touching debts upon record to the crown, viz. by plea, where they may plead, as in *Scire facias* upon a recognizance, or suit upon bond ; and by *Audita Querela*, where they cannot plead, as when execution is sued upon a statute. And if they had no warning in the *Scire facias* ; but upon *Nibil* returned, the judgment passed ; there also the executor may be relieved by *Audita Querela* ; because there was no default in him that he did not plead, or set forth the judgment upon the suit in the *Scire facias*. Nor will it be any plea for the creditor by stat. to say that his statute was acknowledged before the judgment, and so is more ancient ; for a later or more puisne judgment is to be preferred before a statute in time precedent. But if this judgment be satisfied, and is only kept on foot to wrong other creditors, or if their be any defeasance of the judgment yet in force ; then the judgment will not avail to keep off other creditors from their debts. And thus much touching debts by judgment

Co. l. 5. f. 81.
So Wray and Gaudy, inter Bond and Bales, 28 El. vel. circiter.

Yea though a writ of error by the executor to reverse the judgment, yet suffering a statute to be executed, must pay of his own. Read and Beach.

Lock's case. P. 43 Eliz Barre. So held in Read's case sup. Vide 12 H. 7.

Kel. 24, 25, to like purpose.

Co. l. 4. f. 59. So Periam in B.C. inter Charnock & Winsly, 34 Eliz. vel circiter.

Co. l. 5. f. 28.
Co. l. 8. f. 132.
So held in 15 & 16 El. So in the *Scire facias* by Bond against Boles it was held.

ment, *viz.* how they stand in priority before other debts by statute or recognizance. Now to see how they stand among themselves, let this be observed, *viz.* That between one judgment and another had against the testator precedency or priority of time is not material; but he which first sueth execution must be preferred, and before any execution sued it is at the election of the executor to pay whom he will first: yea, if each bring a *Scire facias* upon his judgment, the executor may yet confess the action of which he will first, notwithstanding the *Scire facias* was brought by the one before the other. In this *Scire facias* the defendant may plead generally, that he hath fully administered before the *Scire facias* brought, without shewing that he did administer in payment of debts of as high nature; yet that must be proved upon the evidence, else the trial will fall out against the executor. Thus have I delivered the most material things, in my apprehension, touching debts by judgment: yet thereabout I will add, for the better information of the reader not studied in the law, these few things. First, that what hath been said, is only to be understood of judgments against the testator, and not of any against the executor himself; for of those, being but debts of specialty at the time of the testator's death, we shall speak after. Secondly, what is said of the testator, in case of an executor immediate, is likewise to be understood of the testator's testator, in case of executor of an executor: for where *A.* makes *B.* executor and *B.* makes *C.* executor, there the goods which came from or were left by *A.* be not in the hands of *C.* liable to the judgment had against *B.* nor, on the other side, are the goods of *B.* in the hands of *C.* subject to the judgments

9 E. 4. 14, 15.
 Quæ. of arrear-
 ages of account
 before auditors
 without suit;
 for the executors
 are charged by
 Judgment of the
 auditors by stat.
 W. 2 judgment
 of record.
 10 H. 6. 24. 25.
 Bro. Det. 183.

judgments had against *A*. And the like is to be understood of statutes, recognizances and bonds, as elsewhere is somewhat touched. Thirdly, recoveries or judgments by meer confession, without defence, are yet of the same nature, and to have the same respect, as other recoveries upon trial or otherwise: for though they may seem to be but of the nature of recognizances, which be *debita recognita*; yet do they differ from them, in that here a debt is demanded by a declaration which is intended true, and that therefore the defendant cannot deny it but in case of a recognizance, it is not so, for there usually no action is entered, nor debt demanded. Fourthly, the foreshewed respect to debts by judgment is not to be inclosed within *Westminster-hall*, and be restrained to the four courts there, but may and must extend itself to judgments in other courts of record, *viz.* in cities and towns corporate, having power by charter or prescription to hold plea of debt above forty shillings; as in *London, Oxford, &c.* For although there execution cannot be had of any other goods than such as be within the jurisdiction of that court; yet if the record be removed into the *Chancery* by *Certiorari*, and thence by *Mittimus* into one of the *Benches*, so execution may be had upon any goods in any county of *England*. Fifthly, in case where the testator was bound in a recognizance, and a *Scire facias* brought against him, and thereupon judgment given; although this judgment be not, *quod recuperet*, as in case of actions of debt, but, *quod habeat, executionem*; yet since execution is the life, fruit and effect of all judgments, this may now well stand for a debt by judgment, as I take it.

Quære of judgment in a writ of annuity for arrearages after.

Of

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Of recognizances and statutes.

Next unto debts by judgment are those by stat. or recognizance to be regarded by the executor. And because I find no difference of priority or precedency between these two, I therefore rank them together: yet one reason of preferment given to judgments before statutes in *Harrison's* case, viz. that the one remains a record upon a roll in the king's court, whereas the other being carried in the pocket of the conusee is more private; this I say, should give priority also to recognizances before statutes: as also another reason, for that statutes are not properly records, but obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the stat. is the more expedite remedy, since thereupon execution may be taken out without a *Scire facias* or other suit, which cannot be in the case of a recognizance: for there, if a year be past after the acknowledgment, no execution can be sued out against the party himself acknowledging it, without a *Scire facias* first sued out against him; and if he be dead, then though the year be not past, yet must a *Scire facias* be sued, and thereupon the executor defendant may plead some plea to hold off the execution for a time. But, this notwithstanding, the executor may satisfy the recognizance before the statute, at least if he do it before execution sued thereupon; for they standing in equal degree, it is at his election to give precedency and preferment to whether he will. Neither is it material which of them were first or more ancient; nor between one statute and another doth the time or antiquity give any advantage as touching the goods, though as touching the lands of the conuser it doth;

Lib. 5. 28. b.

Before Sci. fac.
not after voluntarily,
but if levied by writ of extent, is good.

doth ; but as for his goods in the hands of his executor, whosoever first getteth hold of them by his execution, shall have the preferment. And before suing of execution, the executor may give precedence or preferment to whom he will. But now some may object, that there is no course nor writ of execution for any such conusee against the executor ; and if so, then statutes-merchant and of the staple are in vain spoken of ; and it is true that master *Brook*, after chief justice of the *Common Pleas*, in his new case, professeth, that he knew not any remedy for the creditor out of the goods of the conusor after his death. But if this should be so, the law were very defective, since the substance of many, especially of merchants, for and among whom the statute-merchant was provided, consisteth usually more in goods than lands : besides, the plea of *Harrison*, administrator of the goods of *Sidney*, in bar of *Green's* action of debt upon an obligation, *viz.* that the intestate stood bound in a statute staple to *J. S.* and *Green's* reply thereunto, that there were indentures of defeasance, no covenant whereof was broken, and the resolution of the judges, that the said matter in the replication was good to avoid the defendant's plea ; all this, I say, (and the resolution of the judges of the *Common Pleas* in that case, and in the case between *Pemberton* and *Barram*, as also in the *King's Bench* by *Popbam*, and the rest of the judges, that executors must satisfy judgments before statutes, and statutes before obligations) had been idle, and favouring of gross ignorance, if no execution at all could be had against the executor of him bound in a statute ; and then should *Green* have demurred upon the plea of *Harrison*, and need-

Bro. No. 294 &
stat. Mar. 43.

Co. l. 5. f. 28. b.
H. 30 El. Rot.
119.

P. 32. El. Rot.
235. in Co. 3.

not

See Co. lib. 5. 91.
 execution against
 an executor upon
 a statute. Se-
 maine's case.
 Co. lib. 5. f. 28.
 So it satisfied
 though not dis-
 charged.

not to have pleaded that other matter: but none of the judges or serjeants ever conceited any such matter. That which there was replied, *viz.* that the statute was not forfeited, is here to be remembred as good matter both against statutes and recognizances; and that whether the recognizance have a defeasance, or a condition not broken, so that the recognizance is not forfeited. In none of these cases is the executor hindred from payment of debts by specialty, nor can he be justified or excused if by colour thereof he refuse so to do: and indeed else might creditors be exceedingly defrauded by recognizances for the peace and of good behaviour, &c. and so by statutes for performing covenants touching the enjoying of lands, these should keep off the payment of debts; and yet themselves perhaps never be forfeited, nor the sums become payable.

Of debts by specialty.

NOW come we to debts due by specialty, *viz.* Bond or bill, (of which nature the greatest number of debts are.) Let us then see what course the executor must or may hold for satisfaction of these, admitting that the testator stood not indebted to any record, or that no forfeiture is of any such debt, or that there be goods in the executors hands above the amount of such debts by record. This, I say, *dato*, then according to the rule, *Proximus quisque sibi*, the executor may first satisfy himself of such debts as the testator by specialty owed him: for such debts are not released by the creditor's taking upon him to be executor to the debtor; though, on the other side, if the creditor make his debt or

executor

executor, this is a release of the debt. Although it be given out or commonly spoken in the general, that an executor may first pay himself; yet it is to be understood with this caution or condition, *viz.* That the debt to him be of equal height or dignity with the debts to others, according to the rule, *In æquali jure melior est conditio possidentis*: for if his testator were indebted to other men by any statute, judgment or recognizance, and to him whom he maketh executor only by bond or other specialty; then may he not first pay himself, that is, by paying of himself leave them unpaid whose debts are of an higher nature; but if there be sufficient for satisfaction both to them and himself, then is it not material which he first payed. Now touching the debts to other men, the executor hath power to give preferment in payment to whom he will: so that if the testator left but 100 *l.* being indebted to *A.* 100 *l.* and to *B.* 100 *l.* by several obligations; the executor hath power to pay *B.* his whole debt, and to leave *A.* altogether unpaid any part of his debt, so as he have not commenced any suit before payment to *B.* But yet herein this difference is to be taken and observed by executors, that if the time of payment upon the bond of *B.* were not come at the time of the testator's death, then may not the executors, before the money to *B.* become payable, pay him, and leave *A.* unpaid, whose money was presently due. Yet if a *A.* forbear to demand or sue for his debt till the debt of *B.* become also payable; then is it at the will of the executor to pay whether of them he will, so as the other may lose his whole debt, if the goods will not suffice to pay both? What if

28 H. 8. Dy. 22.
Doct. & Stud.
c. 10. p. 78.

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Dr. & St. p. 78.
 Quære if then
 he may not plead
 this payment
 post ult. contin.
 against *A.* as he
 may plead it
 against other
 suits after com-
 menced,
 Co. lib Intr.
 148, 269, 149. a.

if *A.* have only by word demanded his debt, and not by suit, before the debt to *B.* become payable? whether doth that hinder that the executor may not now, when the money to *B.* is also payable, pay him, and leave *A.* unpaid? And hereunto *St. Germ.* answereth negatively, making this verbal demand to be idle, and of no value: yet he addeth, that if *A.* have commenced suit before the debt to *B.* become payable, yet if the executor can delay the suit till the debt of *B.* become payable, so that *A.* can get no judgment before that time, and before *B.* hath commenced suit upon his bond, then may the executor confess his action, and so pay his debt, leaving *A.* unpaid. But of this I make some doubt, for that I find in time of King *Edw.* 4. some admittance, that if *A.* having a tally, patent, or other warrant from the King, for receipt of money of or from a customer or receiver, where other had like warrants before him, but *A.* making the first demand; now must the officer first pay him, or else himself shall become debtor to him, if he first pay others whose demands were after made, though they had warrants before *A.* Likewise there is, as to me seems, some admittance in the same book, that the very demand made by a creditor of his debt from an executor, who hath then *Assets* in his hands, doth entitle the creditor to recover damages against the executor out of his own goods: which if it be so, then doth even the verbal demand lay some tie or obligation upon the executor for payment. But hereabout I lay down nothing peremptorily. We partly may discern by the premises how the executor is to guide himself, in the case where
 there

there be divers debts by specialty, all due and payable at the testator's death, before any suit commenced for any of them: for in that case clearly the first verbal demand gives not any precedence, all being due, and so standing in equal degree. And this is implied in many books, † making the commencement of the suit only that which entitles to priority of payment, or at least restrains the election of the executor. Yet, admit that one creditor first doth begin suit, if others also after sue before he be paid, or have judgment; now cannot the executor pay him first who first commenced suit, but he who first hath judgment must first be satisfied. And the executor may herein yield help to one before the other, viz. by essoins, imparlances or dilatory pleas to the one, and by quick confession to the other's action: for he is not bound against his will to stand out in suit, and expend costs, where the debt is clear: nor is this covin, but lawful discretion, which conscience will also approve, some good consideration inducing. Nay, after suit commenced, yet until the executor have notice thereof, he may pay any other creditor, and then plead that he hath fully administrated before notice. Nor is the sheriff's return of summons or distress sufficient cause of notice; for the summons might perhaps be upon his land: but if it were to his person, it is notice sufficient; and then, to save himself, he must say, that he was not summoned till such a day, before which he had fully administrated.

41 E. 3. Fitz.
Ex. 68. 6 & 7
El. Dy. 232.
Vide 21 H. 7.
Kelw. 74. So.
Walmley Just.
P 39 Elz. in
error at Serjeants
Inn. Co. lib.
Intr. 286.
such a recovery
by confession is
pleaded against
another, and ad-
mitted good, &
f. 148, 149.
Do. & St. p. 78. b.

L

Yet

† It is the notice of the suit.

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Yet doubtless the executor may be arrested at the creditor's suit in some sort, which yet shall be no sufficient notice of this debt. As for the purpose, if he be sued by *Latitat* out of the *King's Bench*, this, supposing a trespass, gives no notice of a debt, so also of a *Subpœna* out of the *Exchequer*; but the original returnable in the *Common Pleas* expresseth the debt, and so in some sort doth the process thereupon, And there it seems by some books, that if it be laid in the same county where the executor dwells, he must take notice of it at his own peril. But this I take not to be law, nor is there any great opinion that way; and although, to make it more clear, the executor in *King Hen.* the fourth his time, estranging himself from notice of the suit before payment to others, did alledge, that the action was laid in a foreign county; that is no great proof, that if his abode had been in the county where the action was brought he must have taken notice; but thus it was clearer, and a surplussage hurts not.

So also was it
said Tr. 29 El.

Now between a debt by obligation and a debt for rent or damages upon a covenant broken, I conceive no difference, nor any priority or precedency; but it is at the executor's discretion to pay first which he will, as if all were by bond. So also of rents behind and unpaid, as I conceive; but touching them, principally intending rents upon leases for years, divers considerations are to be had, and some distinctions to be made. As first, between rent behind at the time of the testator's death, of which *that* before said is to be understood, and *that* which groweth behind, after; next between suit for the rent by action of debt, and distress and avowry.

As

As to the first difference, if the rent grew due since the testator's death, then is it not accounted in law the testator's debt; for only so much is in law accounted *Assets* to the executor, as the profits of the lease amounted to over and above the rent; so as for *that* rent so behind the executor himself stands debtor, as hath been resolved, and therefore he is suable in the *Debet* and *Detinet*: whereas for rent behind in the testator's life, and all other the debts of the testator, he must be sued in the *Detinet* only. Hence it must follow, as it seems, that an executor sued for debt upon a bond or bill cannot (except in some special cases) plead a payment or recovery of rent grown due since his testator's death; though of rent behind at the time of his death it be otherwise. And yet here again another difference or distinction is to be taken, *viz.* where the profits of the lease exceed the rent, and where the rent is greater than the yearly value of the profits; for even there, as elsewhere is shewed, the executor, if he have *Assets*, is tied to the holding of the lease, and payment of the rent, and consequently doth so much of that rent, as exceeds the yearly profit, stand in equal degree the testator's debt, with other debts by specialty. And yet again to re-consider this point, what if the debts of the testator by specialty payable presently at his death, or before the time that any rent can grow due upon this lease, shall amount to the full value of the testator's goods; may not then the executor, though he do not pay those debts before the rent-day, (for that would make the case clear) waive the term? for if he may, then haply, if he do not so, but shall by payment of

Cro. Jac. 238.
 Lord Rich. v.
 Frank administrator, for rent due after the death of intestate; adjudged upon motion in arrest of judgment, that the action well lay in the *Debet* and *Detinet*. Pas. 8 Jac. B. R. though the like judgment in B. R. in the case of Body and Hargrave given Mich. 41 El. was afterwards reversed in Camera Scaccarii. Cro. El. 711.

Point left unresolved.

any of this rent want goods to pay any part of the debts by specialty, it may lie upon himself and his own goods, as happening by his own default. But on the other side it may be said, that he could not waive it so long as he had *Affsets*, because thereby he stood equally liable to pay *that* debt, being once due, as the other debts by specialty: on the other side it may be said, that though the debts for rent and upon bond shall be admitted to be in nature equal; yet the case being put of rent not due at the time of the testator's death, it was not then a debt nor duty; whereas a bond makes a present debt and duty, though not presently payable, the day of payment being not yet come; so as this later is discharged by a release of debts or duties, and so is not the former. So to leave that point unresolved, let us next see whether in some case, though the rent exceed not the yearly value of the land, yet even that payable after the death of the testator may not stand in most part, if not wholly, upon the testator's score, as his debt, as well as if it had been payable before his death. *Posito* then, that the whole or half year's rent is payable at the *Annunciation* of our lady, and that the testator dieth two or three days or some like short time before that feast; now certainly should the law be unreasonable, if it should lay this debt upon the executor's shoulders, in respect of those few winter days profits which he took. But surely, since the taking of the profits induced the law to lay the rent upon the executor as his own debt; therefore, as where the executor had the profits for the whole year or half year, except some few days incurred in the testator's life-time,

That they have the land as executors, yet nothing shall be employed to the execution of the will; but such profits only which are above that which is to make the rent, and therefore so much of the profits, as is to make or answer the rent, they shall take to their own use; and they shall be charged for it in the Debt and Detinet. Pop. 120. per Popham. And if the land be not more worth than the rent, it is a good plea to such action in the Debt and Detinet, for in such case he is to be charged in the Detinet only. Vent. 271. per Cur.

time, those few days will be unregarded, according to the rule, *De minimis non curat Lex*, and the whole rent shall lie upon the executor as his own debt; so on the contrary part, when the whole year or half year's profit, except some few days, incurred after the testator's death, the rent, becoming payable so instantly after the testator's death, must in reason lie wholly upon the testator's estate, as to me it seems. What if to this I add, that the testator's cattle where-with the ground was stocked, do depasture and devour the profits all the time after the testator's death, till the day of payment of the rents? Nay, if the rent were payable at *Mich.* and the *Annunc.* and the testator dies a few days after *Mich.* the rent being of or near the value of the land, it will then be hard that the executor shall for this winter-profit pay the rent out of his own purse, especially if the whole year's rent be payable at that one day, as in some cases it is; or if the whole year's profits were taken in the summer, as in case of a lease of tithes: it is so also of meadow grounds, usually drowned in the winter. So if the lease be then to end, not having a summer half-year to succeed and make amends for the winter: or if the winter half-year be the later half, the lease beginning at *Lady-day*, so that there is but a summer for each winter following, and not any for the winter passed. Of like consideration with these is the case of a lease of woods for a rent, which being fellable but once in eight or nine years, now if the lessee having made the last sale and felling before his death, the law should cast the rent upon the executor's own estate for the time future, it should lay loss upon him; which is

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against reason, and contrary to the nature and disposition in the law, even in this particular: as appears by this, that she enables an executor to pay himself before any debt of equal nature; so as she more tenders an executor's indemnity than any other creditor's. Therefore I think, that, with and upon the differences above shewed, even rent grown due after the testator's death may in some cases be the testator's debt, payable equally with debts by bond. But here I conceive, that if the executor were in such case of destitution of *Assets* as might justify his waiving of a lease over-rented, he then may waive the term's residue; because for the future the profits will come short of answering the rent, though at the first, and so in the total, the profits did exceed the rent. And if, for want of waiving where he might, this rent fall upon him, the payment thereof would be no excuse against another creditor, nor as to him be a good administration; for *Ignorantia Juris non excusat*, This is pertinent to our present consideration, which debt may with safety be paid, leaving another unpaid: and the hazard of executors by ignorance of the law hath been a principal motive to my writing these discourses in *English*. Hitherto we have only considered, as I think, of rents as they be recoverable by action of debt. Now let us see if there may not be somewhat different considerations touching distraining for rent, and so coming to recover it by avowry. Put we then the case, that an executor hath fully administrated in payment of debts by bond, and after the lessor or reversioner cometh, and distraineth for arrearages of rent due in the testator's life; can the executor in bar of the avowry plead fully administrated, as he might have done if
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Where executor
ought to waive
the term.

an action of debt had been brought for these arrearages; Doubtless, I think no; nothing shall hinder the levying of the rent upon the land, as long as it is enjoyed under the title of the lease, except the land come to the king, upon whose possession no distress can be taken. I think therefore that the executor, who payed out of his own purse to the value of this lease, (for so I intend the case, and else could he not have fully administred, as in the case was put) should have abated in the price and valuation of the lease as well the arrearages of rent, as the rent futurely payable, both being equally leviabie upon the land; and if he so have done, he is no loser by payment of this arrearage: but if, trusting to the power of an executor and to the plea of fully administred, he did not so, but disbursed in respect of the lease, to the full value without such abatement, he must bear the loss of his own ignorance. He might also another way have helped himself, *viz.* by payment of that arrearage, leaving other debts by specialty unpaid. And what if suits were present-ly commenced upon the testator's death, before he could make payment of the rent behind? whether might the executor then plead this debt for rent, as he might a debt by judgment or statute? Surely methinks it's probable that he might, because it is a debt from which he cannot be freed by payment of the other debt sued for by specialty. If the reversioner would also commence suit before judgment had for the creditor by specialty, then might the executor help himself by confessing his action first: but this perhaps the reversioner would not conceive safe for him, since that way the others might get judgment before him, and so he might lose

Where executor
may plead rent
in arrear.

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both his suit and his debt; whereas holding himself to the course of distress, the lease continuing, he hath land at the stake for his debt. What if he distrain and avow? may not now the executor pay him, or at least confess his action or avowry, so as he first having judgment may first be satisfied? surely after suit commenced I see not how the creditors by bond can so be prevented, at least without a judgment had for the rent, yea though such a judgment be had; yet because the judgment in that case is not, that he shall recover the sum due for rent, but only that he shall have a return to the pound of the cattle distrained for the rent, it is questionable whether the payment thereupon of the rent shall prevent the judgments after had in the suits upon bonds. But I think it shall; because although it be not an express recovery of the rent, yet it is such a judgment compulsory for the same as makes the payment inevitable and of necessity. And where before we have made the question only between the said rent-debt and the debt by obligation; let us now put the case between the rent-debt and the debt by statute or judgment. If then the lessor after death of the lessee, distrain for the rent behind part of the testator's cattle, and after there comes a writ of execution upon a judgment or statute of the testator's; whether shall these beasts in the pound for rent be delivered in execution or not, admitting that without them there be not goods sufficient for satisfaction of the judgment or statute? And surely I think they cannot be delivered in execution. First, for that they are in the custody of the law, as in *Stringfellow's* case, though there the King's prerogative overtopped that point. Yea so

See 13 R. 2.
Bro. Pledges, 31.
attainder of the
party d strained
shall nor take a-
way the distress.
Vi. Dyer.

so I think, though they be replevied, for that they are to be returned to the pound, if judgment pass for the avowant, to which purpose security is given; so as they are but in the case of a prisoner bailed, who still is in some sort in custody. Secondly, for that this rent incident to and descensible with the reversion breeds a debt of a real nature, and so of more dignity and worth than debts personal. Thirdly, for that the land let (as in a sort debtor) stands chargeable with this distress from the very time of making the lease, as either by contract real of *quid pro quo*, or rather by an operation of law or legal constitution, or ancient custom of the realm, without any contract of persons. Lastly, for that the lessor doth not distrain the cattle therefore, or in that respect, for that they are or were the goods of the testator, but for that he found them levant and couchant upon the land which must afford his rent, or a distress for it if behind: so as if they had been any under-tenant's or stranger's cattle, they might have been distrained. Some may perhaps object this reason why these impounded cattle should be delivered in execution, *viz.* for that where otherwise the creditor by statute or judgment should lose all or part of his debt, yet by this relief done to him shall not the lessor lose his rent, for that he may at any time after distrain any goods or cattle found upon the ground at any time during the continuance of the lease. But here, besides the point of delay and stay for this rent, which to many is the sole means of maintaining their households and families, this farther is considerable, that perhaps the lease may be near expiring, perhaps so highly racked and rented even to or above the value, as
that

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that the executor having his testator's stock taken from it and him by execution, will not stock it any more; and so the land lying fresh, if the lessor shall lose the benefit of his former distress, he shall be perhaps without remedy for his arrearages of rent. And if the case were of a distress for rent behind after the testator's death, I conceive, though not so strongly, for most of the reasons above said, that the law would be all one as in the other case: for though in this case respect shall not be had to the executor's loss, upon whose goods the law casts this debt though not the other; yet here the point of loss must fall either upon the lessor losing his distress, or upon the other creditor by specialty or record losing wholly or in part his debt. And in respect of this local tie upon this land for payment of the rent, whereto even the fealty of the lessee and tenure of the land bindeth him, I think no act that the lessee can do by entering into bonds or statutes, or having judgment against him, can hinder the lessor or reversioner from taking his remedy upon this leased land for the rent therefore due; but rather any other creditor shall be a loser in his debt. Doubtless, if in bar to the avowry for this rent due either before or since the testator's death the executor will plead, that the testator was indebted 1000*l.* by statute, recognizance, or judgment, which is more than all his goods amounted unto; it will be no good plea, but may be demurred upon, What if he plead so much debts of record to the crown? Surely I doubt whether this plea will be allowed in any other court than in the *Exchequer*: yet if these arrearages of rent shall be levied upon the land,

Vide Bro. Pledg.

31.

so as either the executor must pay it, or lose the cattle distrained by a return irreplevifable, and then shall not have sufficient to satisfy the debt to the crown; I see not how he shall well escape, when persued in the *Exchequer* to make up this crown-debt out of his own purse, which is hard For this we may pitch upon as a maxim and principle, that an executor, where no default is in him, shall not be bound to pay more for his testator than his goods amount unto. Again, it is a rule, that where nothing is to be had, *viz.* justly to be had, the king loseth his right: and our books tell us, the king's prerogative must not do wrong. *Potestas ejus juris est, non injuriæ: So Braclon. nam potestas injuriæ non est Dei, sed Diaboli.* On the other side, it may be said, that if land leased come to the King by grant, outlawry, or otherwise, the rent reserved cannot be distrained for; and therefore it is not very unreasonable nor incongruent that the King's interest for his debt should make the distress of a subject stand by and give place. This therefore among other of the premisses do I leave as a *Quære*: nor is it altogether unprofitable either for an executor or creditor to know what ways and passages, what cases and contingents be doubtful and hazardous. And if in these unbeaten paths, where our books and relations have held me forth no light express or particular, I have erred in mis-resolving, or missing to resolve; I hope I shall without difficulty obtain pardon.

Now let us consider of assumptions or promises made by the testator upon good consideration; the performance whereof, or making recompence and satisfaction for not performing, doth lie upon an executor, as before is shewed.

These

Co. lib. 9. f. 88.
b. Doct. & Stud.
lib. 2. cap. 10 &
11.

Co. 1. 9. fo. 90.
Pinchon's case,
and fol. 94.
Dane's case,

Vide Cro. Jac.
613. Booth
v. Crampton,
Pas. 19 Jac.
where in an ac-
tion against ex-
ecutor on his
own promise af-
ter verdict moti-
on in arrest of
judgment that
declaration doth
not aver assets at
time of promise
but not allowed,
and judgment for
plaintiff.

These therefore are to come behind, and give place unto all the former; so as an executor this way or for these sued may plead debts by specialty, rent, &c. amounting to the whole goods. And yet these debts by contract or assumption express are to be satisfied before legacies be to be had. First, because by the common law of the land those are recoverable, and so are not legacies. Next, because, as our books speak, it concerns the soul of the testator to have *es alienum*, all duties and debts to other men satisfied before the debtor's voluntary gifts or bequests. Also these debts by assumption or simple contract are to be satisfied before the reasonable part of the wife or children, to which by custom in some counties they are intitled. See 22 *Ed.* 4. 21. and 2 *Ed.* 4. 13. and 2 *Hen.* 6. 16. And note that in such an action upon the case, it is not of necessity to lay or set forth in the declaration that the defendant hath assets to pay all debts by specialty, and this also; but if there want, the defendant must alledge that in his excuse, for else it shall be presumed that he hath *Assets*. So also in an action upon a case grounded upon the executor's own assumption to pay his testator's debt: and yet, as the L. *Coke* conceives, and upon good reason, as to me it seems, if the executor so promising had not *Assets* sufficient in his hands to pay this debt promised, he pleading *Non Assumpsit* may give that in evidence; for then the consideration faileth: as also if there were no such debt due, since the plaintiff could not have recovered if he had sued; and so his forbearance to sue was no valuable consideration.

C H A P. XIII.

Of devastation or wasting.

THAT which St. *Paul* of dispensers spiritual (who are as it were the executors of the last will and testament of our Saviour *Christ*) doth say or enjoin, *viz.* that they must be *found faithful*; the same is required of these less or inferior dispensers, the executors of men's wills: and hereof they are to be regardful, not only in respect of escaping damage to their own estates, but more especially in respect of an oath which divers of our books mention to be taken by executors. And in one of the books of relations of cases in the twentieth year of *H. 7.* his time, there is an expression of three things whereto the office of an executor tieth him. 1. To do truly, and thereto are they sworn, faith this book. 2. To be diligent, *viz.* with sedulity to attend the discharge of the trust. 3. To do lawfully; nor well can this later be without knowledge what is lawful or required by the law. Now what is formerly said of the right method and order of payment of debts, discovereth in much part how and by what ways an executor may waste and mis-spend his testator's goods, and consequently incur a devastation, and so make his own goods liable. But of that more fully and particularly by itself. And herein we will consider of these parts.

1. What shall be said to be a wasting or devastating, and how many ways that may be done.

2. Who shall by this act be charged to yield recompence.

3. Who

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3. Who shall take the benefit or advantage of it.

4. How far or in what measure the advantage shall be taken.

5. What way or by what means it shall be had.

As to the first, this wasting is done divers ways. 1. By the executor his plain, palpable and direct giving, selling, spending or consuming the testator's goods after his own will, leaving debts unpaid. 2. By paying what is not to be paid; which yet is to be understood where there are debts payable, and unpaid. 3. By the way formerly discoursed of, *viz.* the not observing the right method and order of payment. 4. By assenting to a legatee's having a thing bequeathed, debts being unpaid. 5. By selling goods of the testator's at an under value, for (be the appraisment what it will and let him sell for what he will) he must stand charged to the best and utmost value towards the creditors. Yet if, upon a judgment against the testator or the executor, the sheriff sell some of the testator's goods at an under value, this is no vastation of the executor, for this difference *Hody* chief Baron makes. But since an executor may haply prevent this act of the sheriff, by paying the due sum upon sale of the testator's goods at the best value or otherwise, he is to be blamed to leave it to the conscience of the sheriff or under sheriff rather. 6. And lastly, this may be done to the executor's smart by undue, *viz.* not legal discharging of any debt or duty pertaining to the testator, and that divers ways requiring heedfulness. As if an executor upon a bond of two hundred pounds forfeited for payment of 100*l.* accept

accept the principal, or perhaps also some use, costs, or damage, and give a release or acquittal of the whole forfeited bond, or of all actions, or upon record acknowledge satisfaction upon judgment had; this is a wasting of so much as the penal sum is more than is received, and so far his own goods stand liable to creditors not satisfied: and so doubtless is it, if he do but give up the bond, having no judgment upon it, though he neither make release, nor acknowledge satisfaction. But his verbal agreement to require or sue for no more, or his giving a note of receipt for so much as he hath received, or delivering of the bond into a friend's hands or into a court of equity in way of security to the debtor, that he shall not be sued for more, is no devastation, since still the rest in law remains due and suable. So this sets no more upon the executor's score than he received. But let him take heed of releasing, except he be sure there be no other debts demandable. Nor only is there danger in releasing of debts, but of trespass or other causes of action also. As if one take away goods from the testator, or from his executor; if the executor make him a release, this is a devastation, and makes his own goods liable to the whole value of the goods released: as appears by *Russel's* case where the release of an infant executor, to one who had taken and committed to his use jewels and goods of the testator, being pleaded, the release was therefore held void in respect of nonage; for that if it should have stood good, it had amounted to a *Devastavit*, and made the executor's own goods liable; which, his infancy considered, had been hard. Another way of discharging, dangerous

to

13 E. 3. Fitz. 91.
Yet on the other side, if an executor by payment of 110 l. get in a forfeited bond of 200 l. it shall be an administr. but of 110 l. 27 H. 8. 6. P. Fitz. Inf.

Lib. 5. 27.

to executors is, submitting matters of debt or duty, or touching goods taken away, to arbitration. For if by the award of the arbitrators the debtors or wrong-doers be discharged or acquitted without making full recompence, the rest of the value will (as to other creditors) sit upon the executors skirts, because it was their voluntary act thus to submit it to arbitrators. Thus may executors fall under prejudice, not only by wilful wasting or unfaithful miscarriage, (wherein they are not to be pitied) but through incogitancy and unskilfulness also. Nay, I may say truly, that it is very hard for executors in some cases to walk safely: for besides that, to find out all judgments and recognizances by or against their testators is of some difficulty more than for statutes, whereof by search in an office discovery may be had; yet with this difference, that statutes-merchant and statutes-staple may be and stand effectual against executors, though not inrolled; albeit against purchasers of the conusor's land they be not of force, if neglect be of inrolment within three months. But where statutes or recognizances lie for performance of covenants upon sale or lease of lands, marriage agreements, or otherwise; how hard is it for executors to know whether any covenant be broken or not? How hard to be sure they find out all bonds, bills, covenants and articles in writing, made and kept by others, whereby any money is due and payable before debts by contract or legacies, as also all promises or debts by contract payable before legacies? For the law hath prescribed no time for their claim and demand: and whether some such thing or mean of publication were not fit
to

This discovery is difficult, for even a judgment in a court of piepowders is binding.

to be enacted, let the judicious consider. To attain to this knowledge of the testator's debts, I remember that it is by the lord *Brook* reported, that in King *Hen.* the 8. his time, Sir *Edmund Knightly* being executor to Sir *William Spencer*, made proclamation in certain market-towns, that the creditors should come by a certain day, and claim and prove their debts; but he for this was committed to the *Fleet*, and fined. For that none may make proclamation, saith the book, without warrant or authority from the king, except mayors and such like governors of towns, who by privilege or custom may so do. But the dangers are only where there is not sufficient of the testator's goods and chattels to satisfy both debts and legacies. For where there is so, the executor is not in any such hazard as aforesaid. This descry of danger may breed caution; and *Qui timent & cavent vitant.*

As to the second, we shall have in consideration two sorts of persons, *videlicet*, 1. his executors, there being many times divers executors, and the waste or devastation done but by one; 2. the executor's own heirs, executors and administrator, *viz.* whether, he dying, this act shall fix upon them like charge and burthen for satisfaction, as upon himself should have lien in case he had lived.

Touching his companions though all together make but one executor, yet the mis-doing of one shall not charge the rest, nor make their goods liable to recompence: as both appears by the book of *Entries*, and was also held in the time of *Henry* the seventh, *Anno* 12. of his reign. Yea of the opinion were the judges twice in the late *Queen's* time, *viz.* first a

M

case

Lib. Intrat fol.
327. Kelw. R. p.
fol. 23 So 11 H.
6 38. a.
4 E. D. 2 10 a.
the Writ of
Infringement
against the
waster only.
P 4 H 8. Rot.
303. Tr 34. El.
Par. 36 Eliz.

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case between *Walter* and *Sutton*, in the *Common Pleas*, and shortly after in the *King's Bench*, in a case between *Hankeford* and *Metford*; tho' these two cases be not reported in print. And surely this stands with rules of reason or justice, that each should bear his own burthen. If it were otherwise, many would decline and abandon executorships, as very dangerous to the most honest and faithful, in case they were subject to racking by the miscarriage of their collegues.

The executor of an executor liable in equity for any waste or wrong done by his testator tho' not at law, being considered as a personal tort.
2 Chan. Ca. 217.
2 Mod. 293.
Chan. Ca. 303.
Mich. 31 & 32 Eliz.
Tr. 34 El.

As for the executors or administrators of the wasting executor dying before he have born the burthen of his mis-doing, I have found contrary opinions, even in the late Queen's time, For first, in the *Exchequer* it was conceived to be as a trespass dying with the person, as coming within the rule, *Actio personalis moritur cum persona*. But in the said case of *Walter* and *Sutton* the court of *Common Pleas* was of contrary opinion, viz. that this was not escaped by the death of this mis-doer; but the law would pursue his executors or administrators, and lay upon their backs the burthen of recompence or satisfaction; for that the testator or intestate, during this wrong had made himself to be debtor in the first testator's stead, and therefore they who represent his person must with his goods make amends and supply. And this later opinion was something in time after the former. Also between these two times was there an opinion in the said court of *Common Pleas* agreeing in part with this later: for there a judgment being had against an executor, and the sheriff upon the *Fieri facias* returning that there were no goods of the testators in the executor's hands, and then this

Tr. 34. Eliz.
Mich. 32 & 33
Eliz.

this executor dying, a *Scire facias* upon a suggestion of devastation by the said executor deceased was awarded against his executor, and that upon good debate, and shew of a precedent left, and reported by M. *Jennour* in King *Hen. 8.* his time. And it was then said to have been clear, that if a devastation had been returned in the life-time of the said wastful executor, his executor then should have been charged. All the doubt was, for that here that was not done in his life-time, yet at last affirmatively (as above is shewed) the resolution was.

Touching the third point, *viz.* To whom the advantage of wasting shall accrue, or who by reason thereof shall charge this wasting executor: put we the case the testator stood indebted to *A.* by statute, and to *B. C. and D.* by specialty not of record, as bond, bill, &c. and the executor having no more in *Assets* than only an hundred pounds, and this all being due to *D.* he payeth him the whole hundred pounds, not having any thing left to satisfy any of the rest of the creditors: hereby wrong is done to none but *A.* who was a creditor by statute, and therefore he only shall make this executor to pay the like sum out of his own goods, since as to him only this is a devastation, for that it was at his election to pay off the other creditors, which he would, no suit being commenced by any of them, consequently no wrong was done to *B.* nor *C.* And if no such debt had been by statute, but all had been creditors, by specialty, and *A.* only had commenced suit, and that known to the executor; now if after he paid all

the advantage of this vastation, taking up the whole sum wasted, *Quæ.* shall relieve himself against another.

If upon fully admitted pleaded to one, vel aliter, he have how the executor

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to *D.* he stands only as to *A.* liable in his own goods, and not to *B.* nor *C.* But if the executor had only paid a legacy or debt by contract, leaving nothing for satisfaction of the debts by specialty, then had he stood equally liable to each of the other creditors. *Capiat qui capere potest*, viz. He who first could recover, or by the voluntary act of the executor could obtain payment, must be preferred, if the sum would reach no farther. For it shall by this mispayment, or misconversion, stand with the executor as if he had not paid it nor departed from it at all upon the matter: and therefore I doubt not but it is free for him to give the advantage of this his error to which creditor by specialty he will, so as he shall stand free from all the rest, no surplufage remaining, nor any creditor of record being. For if there be any debt upon record, the executor sued by a creditor upon bond may, notwithstanding this his wasting, plead in bar of this suit, that there is such a record of a debt not satisfied, and that he hath no more than that debt amounts unto, and so admit so much still in his hands as he hath mis-administred, though in kind it be not in his hand, but mispent, or unduly paid, as aforesaid. And what is before shewed of the statutes precedency before bonds, in taking the advantage against an executor for devasting or wasting, the same is to be understood of precedency of judgments before statutes, and debts to the King before judgments, &c.

As touching the fourth point, viz. How far the executor thus wasting shall incur damage or make his own goods liable; doubtless, no farther than the value of testator's goods wasted or mis-administred. Therefore if one have advantage

tage thereof to the full sum, no other after shall, for he is no farther a trespasser or wrong-doer nor is the testator's estate any farther or deeper damaged. And as damages for trespass are to be proportioned to the value of the wrong done and loss sustained; so also in this case the executor by his misdoing doth not draw upon himself his testator's whole debts, but so much only as the goods amounted to which he did mis-administer, and which should have gone to the payment of the testator's debt, if he had not so misguided himself in the office of executorship; which default he must repair or make good. And this proportion seems to me proved by the case in *K. Edw. 3.* where the value or quantity is found, especially of the goods administered wrongfully, though there by a wrongful person: and in *Sutton's* case it was expressly held, that each executor should answer for so much as he wasted. 41 E. 3. 31.

Now for the fifth and last point, *viz.* How and in what manner relief shall be had upon this point of wasting, for him to whom it pertains: First, this is to be observed, that in case where the verdict passeth directly against the plaintiff, no devastation can come in question, for that no judgment being for the plaintiff, no writ of execution can issue; and therefore, if upon the issue of fully administered, it shall appear that there hath been a devastation, which causeth *Assets* to fail, then must the jury find that the defendant hath *Assets*, and not find a devastation, as was resolved in the *King's Bench* in the late Queen's time between *Hankeford* and *Metsford*: for there the jury finding a devastation, *viz.* a surrender of a lease for years left by Pas, 36 El. in 6.

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the testator, it was held void and nugatory, and was not regarded by the court, which said that must come in by the sheriff's return, viz. upon the *Fieri facias*. Thus *Assets* being found in the executor's hands judgment is given for the plaintiff to recover his debt, and to have it levied of these *Assets*: nor is this finding of them by a jury against truth, though they be wasted, and so not to be had in kind; for the executor had them in right, since he hath not rightfully parted from them; according to the rule, *Pro possessore habetur qui dolo (or injuria) desit possidere*. As in the case first put, this wasting cannot come in question for want of a judgment for the plaintiff; so also where the judgment it self extendeth to the executor's own goods by reason of some false plea, whereof we shall after consider: for since that the consequence and effect of a vastation is but to make the executor's own proper goods liable to the debt of the creditor, this is altogether needless where the judgment it self hath laid hold of his goods. But now in case where the judgment extends only to the testator's goods in the executor's hands, let us find the way to relieve the creditor, in case the testator's goods be wasted by mis-administring or otherwise; for hereabout the right way hath often been missed, and again easily may be. In the later end of the late Queen's time, this course was taken, viz. The sheriff returning generally, that the executor had no goods, a surmise was entered, that the executor had converted to his own use the testator's goods, whereupon a writ was awarded to the sheriff to enquire thereof by jury or inquest, which he did, and returned, that it was found

43 El. Pettifer's
case Co. l. 5. f.
32.

found that the executor had wasted the goods ; and thereupon a *Scire facias* was awarded against the executor, to shew cause why execution should not be of his own goods ; and upon two *Nibils* returned, execution was so awarded : but a writ of error was hereupon brought. And although it were said, for defence of that course, that it was usual in the *Common Pleas*, and more favourable than the other course, where the sheriff only returneth the wasting, or is sole judge thereof, whereas here it was found by an inquest of jurors, and thereupon a *Scire facias* awarded ; yet did the court resolve the contrary, and reverse this execution as erroneous : for it was said, that upon the sheriffs return of *Nulla Bona*, viz. that there were no goods of the testator to be found, the plaintiff should have a special writ of *Fi. fac.* willing the sheriff to levy the sum recovered either of the goods of the testator or if it could appear that the executor had wasted the testator's, then to levy it of his own goods. And this way, as was said, the executor hath good remedy by action against the sheriff if without just cause he levy it of his goods ; but the other way, viz. when inquest is thereupon taken, the remedy fails, since neither the sheriff doing according to the inquest can be punished, nor the jurors finding falsely are subject to any attainr, it being no verdict upon issue joined, but an inquest of office, which excludeth also all challenge of jurors. And whereas that book mentions the sheriff's subjection to action only in case of his mis-feasance or doing wrong ; I conceive that he is likewise suable for omission or non-feasance in this case, viz. for not levying the debt upon the executor's

So 9 H. 6. f. 9.
See Paston,
11 H. 8 16. 36.
upon surmise
that A. hath
wasted, a Fieri
facias may issue
against his goods
only, if so, &c.
So lib. Intr. fol.
11.

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own goods, where proof is made of his wasting. And where the book mentions this *Fieri facias* to be in this manner upon the sheriff's return in a *Scire facias*, doubtless the book therein is misprinted, and should be a *Fieri facias*; for in a *Scire facias* the sheriff can return nothing but that he warned the party, or that he hath nothing whereby he may be warned. This then is the course there prescribed, that first a general *Fieri facias* go out, and that thereupon the sheriff return generally, that the defendant hath no goods of the testator's, and that thereupon the said special writ is to issue. Yet in the beginning of the late Queen's time, the verdict passing for the plaintiff upon the issue of fully administered, the sheriff was not permitted to make such a general return of no goods to be found of the testator's, but was enforced by the court upon good advisement either to levy the debt, or to return a *Devastavit*: and so it was done at last by the sheriffs of *London*, much against their minds, and thereupon went out a writ to levy the debt of the executor's own goods, first in *London*, and after in *Devonshire*, upon a *Testatum* that the executor had goods there. And it was there said, that if no goods could be there found, then the plaintiff might have a *Capias* to take the executor's body in execution, or an *Elegit* for the moiety of his lands. But certainly I cannot find (except with a difference) how this course of enforcing the sheriff to do one of these two can be just; as neither could justice *Fultborp* in the time of

2 El. D. 185.
Woodw. and
Chichester's case.

11 H. 6. f. 18.
28 H. 8. Dv. 3.
Yea Co. li 6. f.
47. 48. Asses in
Ireland or else-
where beyond
the sea, may be
found by the
jury where the
action is laid,
For the Pl. may
if he will sug-
gest the being of
Assets in a

foreign country, and this is usually done. See Lib. Intr 11. action upon the case for a false return of *devastavit*. contra sac. sui deb. tum, 28 H 8.

King

King *Hen.* the sixth approve it. For a jury of one county, may find *Assets* in another county, as was resolved in the time of King *Henry* the eighth, which, yet was understood of goods moveable, not of lands. This then thus being, if a jury of *Kent* find *Assets* which be in *London* or *Essex*, how can the sheriff of *Kent*, where the action was laid, levy the debt recovered by or out of these goods? or, since he cannot, why should he be compelled to make a false return of a waisting, when the goods remain unspent and unwaisted in another county? Why rather should he not be suffered to return according to truth, that there is nothing within his county or bailiwick whereof the debt may be levied, since even his oath tieth him to make a true return? Nor is this contrary to the verdict, finding *Assets* generally; and this so returned upon a *Testatum*, the process may be directed into the right county. But in the said case it was replied to the plea of fully administr'd, that there were *Assets* in *Essex*, the action being laid in *Middlesex*, and yet, as it seems by the book, the trial was to be by a jury of *Middlesex*, which saith the book, may find the *Assets* in *Essex*: but there the plea was demurred upon, and held a good plea; which proves, that although the transitoriness of the *Assets* make them subject to the notice of a foreign jury, yet is it not like an act transitory, and not local, for that must be pleaded to be done in the place where the action is laid, though in truth not so. But had

2 Ma. Bro. attain-
taint 104 & 10
El. Dyer 271.
Because local &
fixed, otherwise
held 3 Jac. in
104. 18 H. 7.

Com. Ban. Co. lib. 6. f. 46, 47. 22 E. 49. & 2 Ma. Bro. attain
Kelw. Rep. 51. a. So held P. 31 E. in Scaccar.

laid ;

laid; the rather for that perhaps they may be real chattels, *viz.* lands leased to the testator, or other lands of him appointed to be sold for payment of debts, which, as heretofore hath been held, a jury of another county cannot find. Besides, although such a foreign jury may find other moveable *Assets*, yet is it at their election, they are not thereto compellable, as elsewhere is holden. Here then may be the difference, *viz.* That if the *Assets* be found to be in the county where the trial is, there the sheriff of that county cannot return *Nulla Bona*, without adding that the executor had wasted: but if there be no verdict at all touching *Assets*, judgment passing against the executor upon a demurrer confession, *Nilil dicit*, or the like; there may the sheriff make such a return of *Nulla bona Testatoris*, without returning any devastation: and so also where the verdict either findeth *Assets* generally, not finding in what place they be; or expressly findeth them to be in another county, as a little before we found may be done by a jury of *London* of *Assets* in *Essex*.

So if the process for execution go into another county than where the verdict found as the difference was held in Scac. 31 El. 28. H. 3. Dy. 30. b. Pas. 4 H. 8. Rot. 30; 4 El. Dyer. 210. But 3 H. 6. 12. without any *Sci. fa.* upon the devast. returned, a *Cip.* was awarded by the court; and see 9 H. 57. Bro. Ex. 57, & Lib. intr. 320. A. *Fi. fac.* absolutely and without condition. So 9 H. 6. 47, 50. A manuscript report. 36 H. 6. 3. and Mor-dant, 12 H. 7. Kel. Rep. 24. But *Vavafor* just. and all the other *ser-jeants à contra*, 2 El. D. 185.

In King *Henry* the eighth his time, as a little after the case of *Chichester* is by the *Ld. Dyer* reported, the sheriff returning upon the *Fieri facias*, that the executors had no goods of the testator's did add in the same return, that one of the two executors had wasted, and thereupon a *Sci. fac.* was awarded against him; and upon *Sci. feci.* returned, and default made, execution was adjudged, and awarded against his goods only. And this course of *Sci. fac.* both the *L. Dy.* (as elsewhere I find it reported) and *Pri-sot, temp. H. 6.* approved. But I am perplexed with doubt what plea the executor coming in upon

upon the *Scire facias* could plead; for except his denial of wasting might be pleaded contrary to the Sheriff's return, and put in issue, so as to cause a new Trial after a former, perhaps preceding judgment, which I think would not be admitted, then his coming in, is to little purpose, for ought I can conceive. Here again it must be observed, that in the case of *Chichester*, the judgment was had upon trial of fully administered: but in the other case in the time of King *Henry* the eighth it was upon confession; which is all one, as I take it, with condemnation upon demurrer, or *Non sum informatus*, or trial upon *Non est factum* to the bond, or a release to the testator, or the like. Now between all these and that of *Chichester* there is a broad difference: for there the defendant being convicted by verdict to have *Assets*, which if they continue not in his hands in kind, must be answered out of his own goods as wasted, therefore the *Fieri fac.* to levy the debt of the testator's goods if any found, or in default thereof out of his own goods, is very agreeable and pursuant; but in none of the other cases is there any such trial or conviction of the defendant's having *Assets*, so as it rests *æque dubium* whether they have *Assets* or not: and therefore it may seem somewhat hard and harsh to send out such a writ in that case; and so should I have thought if I had only seen the report of *Pettifer's* case. But looking into the record, and finding the condemnation there to be by *Nihil dicit* in effect, I cannot uphold any distinction of course in respect of the said difference of cases. Nor indeed doth that course directed presume that the executor either hath *Assets*, or hath wasted them,

but

Co. l. 5. f. 31.
 Mich. 41 El. Rot.
 2. 4. Co. li. intr.
 266. b. A recovery of debt precedent was pleaded: Pl. replied Nul tiel record, and defend. would not maintain his plea. Ideo condemp. If nei her, he must so return, and do nothing.

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but commands that if *Assets*, &c. then the levying shall be one way; if wasting, then another way: so if neither, *Nil fiendum*.

Where the husband surviving the wife, may be charged in equity upon a *Devastavit*, Vide 1 *Lutw.* 670. upon equity of the stat. 30 *Car.* 2. See *Salk. Rep.* 310.

C H A P. XIV.

Of an executor of his own wrong.

TO begin with some definition or description of this man; he is such as takes upon him the office of an executor by intrusion, not being so constituted by the testator or deceased, nor for want of such constitution substituted by the ordinary to administer. Touching whom we will consider in these parts, and with this method, *viz.*

1. What acts or intermedlings of such a one, not being executor nor administrator by right, shall make him become an executor by wrong. *Vide* five more, *per Stat.* 43 *El. cap.* 8.

2. In what manner and by what name such shall be sued, especially when another than he is executor or administrator, or himself after such act becomes administrator.

3. How far he becomes liable to the creditors, and how and to whom.

4. What acts done by him shall stand firm as if he had been an executor by right.

5. See a late stat. 43 *El. cap.* 8. hereabout.

As to the first, it was in the time of Queen *Mary* doubted, and not resolved, whether the
only

1 Point 1 & 2
P. & M. Dy.
103. b.

only seising and taking into one's hands the goods of the deceased did make one executor of his own wrong, without any farther act. And in the beginning of the late Queen's time the *Ld. Dyer* said, that the possession and occupation of, or meddling with the goods is *that* which gives notice to creditors whom they are to sue as executor. But doubtless creditors must look farther before suit; for else can they not know whether he so intermeddling be executor or administrator; nor consequently how to found their suit rightly and safely for good success; since a suit against an executor as administrator, or against an administrator as executor, will prove ruinous, and fall to the ground. Yea where an administrator sued as executor did not plead that administration was committed unto him, but generally denied that he was executor, or administered as executor; the *Lord Dyer* held that it must be found for him, yet left it doubtful; but the clear and safe way had been to have pleaded the administration, &c. and in the former case the *Lord Dyer* said, that one intermeddling only about the funeral and laying out money therefore, an overseer or conductor, or he who hath letters of the ordinary *ad colligend. viz.* to get and keep the goods in safety, and he who intermedleth by virtue of a *will* truly made, but controlled by a later *will* after found and proved, may free himself from being an executor of his own wrong, by special pleading how or in what right he intermeddled, and traversing his administering in other manner: and that this traverse need not, nay may not be, was held in the time of King *Hen. 6.* and *7.* for that such acts amount

1 El. Dy. 166.
& 167. So also
Belkn. 50Ed 3.9.

13 & 14 El. Dy.
305, 306 1 El.
Dy. 166 & 167.
See l. intr. 322.0

12 H. 6. 28. 10
 H. 7. 28. Yet lib.
 intrat. 321. b.
 where he con-
 fessed about fu-
 neral, be traversed
 aliter Lib. in-
 trat 321. where
 by letter ad coi-
 lig. he traversed,
 Absq; hoc quod
 & Ex.
 21 H. 6. 21.

amount not to any administering at all; and where no administering at all is confessed, such a traverse of not administering in other manner is dissonant, and not legal. But let us look back upon these several points exempted by the Lord *Dyer*, and we shall see some cautions necessary touching them and their safe entertainment. First, as touching the point of burying the dead, it must be understood to be with some expence of the deceased's goods, and so it is expressed in the said book of *Hen.* the 6th his time: else for a man out of charity to lay out of his own money (not intermeddling with the goods of the deceased) to bury a friend, hath little colour to involve him so doing in an executorship by wrong. Taking the case then, that such person lays out or expends, of the deceased's goods or money upon his funeral, heed must be taken touching the measure, and proportion whereabout. Though I can give no particular and distinct limit, yet doubtless either meer necessity, *viz.* church-duties, &c. or at least decent suitableness to his quality must be the bounds. And herein to speak as I think, this later must either be utterly excluded, or held within very narrow compass: for what reason that a knight or man of higher quality, leaving (though perhaps entailed lands of good value) yet goods not sufficient to pay his debts, should have an hundred pounds or more of that which should satisfy creditors, spent in pompous interring of him for his worship and reputation? Next, overseers may only be excused for seeking to preserve and keep the testator's goods, not in case they expend or dispose thereof. So also for him who is authorized by the ordinary

to collect, for if he sell or dispose of any (though goods otherwise subject to perishing) it makes him an executor by wrong, as was resolved in the late Queen's time, notwithstanding that by the ordinary's letters he was expressly directed or warranted so to do; for it was said, the ordinary himself could not so do. As for him who administered by virtue of a *will* after disproved, or controlled by a later, he must not doubtless stand free for the goods before administered, but either as rightful or wrongful executor stand liable to the creditors. Nor doth every such intermeddling by one out of all these excuses and evasions as would be an administration, make one an executor by wrong. If one do but take an horse of the deceased, and tie him in his house or stable, this makes him not an executor, saith *Paston*, justice, all like acts or intermedlings; as he that delivers to the wife of the deceased her apparel, at least if it be no more than is convenient to her degree. But if she take, or another deliver more than such to her, she or he becomes an executor by wrong. But now let us come to a difference, where there is a rightful executor, and a *will* by him proved, or administration committed; for there such light acts or intermedlings shall not make one an executor by wrong, as where there is no other of right to be sued. As if one take goods wrongfully from such a right executor, this (though he convert them to his own use) makes him not an executor by wrong, but a trespasser to the rightful executor or administrator, who even for these goods, once *Assets* in his hands, stands liable to suits of creditors, they being neither lawfully

Lib. intr. 322. 8
& 9 Eliz. Dyer
255. 256. He
sold blended
corn, but pleaded
not the special
matter.

1 & 2 P. & M.
Dy. 18^o.
21 H. 6. 28.

3 H. 6. 32. 1 El.
Dy. 166.
Tr. 37 El. by
Fenner, just. if
one do any such
act as pulls the
property out of
the executor, he
is become an
executor by
wrong.

If the goods be
aliened by fraud,
he who takes
them after the
executor's death
is an executor by
wrong Tr. 37
Eliz. D. 5 E. 4.
72. a.
Tr. 2 Ja. in
Com. B. Co. lib.
5. 33. 34.

lawfully evicted nor rightly administered: but in case there had been no executor at that time, or no will proved, nor administration committed, then such taking of the deceased's goods into a strange hand had made an executorship by wrong. And thus was the difference lately resolved, as is reported by the *L. Coke* in the case between *Read* and *Carter* in the *Common Pleas*.

Yet this farther difference was there held, *viz.* That although there be an executor or administrator by right, yet if a stranger take upon him to receive debts and make acquittances, or to pay debts, claiming to be an executor, he is suable as an executor by this act: and so also in the late Queen's time was held by six justices, as touching the receipt of debts and making acquittances; but the book mentions not whether any other executor then were, or not. But in the point of bare payment of debts, *Frowick* makes another difference, *viz.* If a stranger do with his own money pay the debts of a friend deceased, and not with the debtor's; this is but an act of charity, and makes him not an executor by wrong: otherwise, if with the debtor's money. Yet to this another difference must be added, *viz.* That if he thus paying with his own money, have taken into his own hands goods of the deceased; then is his payment presumed as by or out of the value of these goods, and so makes him an executor by wrong. Contrarily, if he have no such goods in his hands. And in the point of intermeddling with and disposing of the testator's goods, where another executor is, this farther difference is to be added or understood, *viz.* That where the goods
so

1 Eliz. D. 160. b.

7 H. 5. 20.

so taken never came actually to the executor's hands, but were in a remote place, there this taker becomes executor. For as it were mischievous to the executor, if he should by a possession in law cast upon him, stand chargeable with these goods in remote places purloined, as *Assets* in his hands; so were it as mischievous to creditors, if neither executor by right, nor this stranger as an executor by wrong, should stand liable to creditors for them. It is true, that the right executor may sue and recover damages for them, and that so recovered shall be *Assets*; but the creditor hath no mean at the Common Law to enforce him to sue, and perhaps it may be a cold suit. And with these additions I think *that* late resolved difference may stand firm and sound. Yet in former times, without such difference, the taking only and possession of the goods of the deceased was held to create an executorship by wrong, as *Belknap* said in the time of King *Edward* the 5^o E. 3 fo. 9. third; and especially if the act were such as removed the property of the right executor, Tr. 3 Eliz. as Justice *Fenner* in the late Queen's time said, *teste meipso*.

How, and by what name, suit shall be against such, and the like.

TOUCHING the second point, *viz.* In what ² Point. manner suit shall be against such: First, in general, this usurping executor is not in suit to be distinguished by name from the right executor, but to be sued generally by the name of executor of the last will and testament of the

L. 5 E. 4. 72.
Co. lib. 5. 30.
31 & 32. b.
21 H. 6. 8.

N

de-

Vide Coke lib.
5. 2 part fo. 33.
b. Reade's case.

Co. lib. intrat.
154. But 145. m.
in the verdict he
is called exec.
de injuria. sua
prop ia 39 H.
6. 45, 46.
11 H. 8. 8 19.
9 E. 4. 14, 15.
1 & 2 P. & M.
Dy. 165.
33 H. 6. 38.

25 H. 6 31.

R. 3. 20.

21 H. 6. 8. If
the administra-
tion were com-
mitted before
the suit began.

defunct; and then if he will deny himself so to be, he must plead that he neither is executor, nor hath administered as executor. Then the plaintiff must prove that he hath administered in some such or the like sort as aforesaid. And it hath been divers times held, that where there is a right executor, and yet another doth administer by wrong, it is at the election of creditors either to sue them jointly together, or one or both of them severally and by himself. But if, where administration is committed, another also administers by wrong, these cannot be sued together as administrators; for though one may be an executor by usurpation or wrong, yet none can come to be an administrator by wrong, since no other but such as receiveth that power from the ordinary can so be: therefore in that case there is a necessity of suing him apart and by himself (who so usurpeth administration) by the name of an executor.

So if *A.* administer the goods of *B.* not being executor nor administrator, and after his such doing and disposing of the goods, he obtaineth administration of the goods of *B.* but the goods left or coming to his hands since the administration committed suffice not without the other debts received or released, or goods sold before, to satisfy creditors: now if any sue *A.* by the name of administrator, he shall have no farther relief than according to the value or extent of the goods left in or come into his hands since the administration committed; and if those be fully administered, he shall get nothing; if they remain unadministered, but amount not fully to his debt, he must want so much of satisfaction;

tisfaction; and if he will be relieved or satisfied out of the goods before disposed of, he must sue *A.* as executor of *B.* And so was it ruled and resolved by *Gawdy* and *Shute*, justices in the *King's Bench*, in the late *Queen's* time, *viz.* *Tr.* 30 *Eliz.* And if this now administrator will plead in abatement of this action, that administration was committed to him, and demand judgment, if suit shall be against him as executor, then the plaintiff must in the replication, as I take it, set forth the special matter, *viz.* how the defendant did administer before administration to him committed. But if one to whom administration is committed do devast, and this administration is by suit repealed, because he was not the next of kin, and administration is committed to another; now a creditor who would be relieved out of the goods wasted, must sue *that* first as administrator, and not as executor of his own wrong, said *Popham*, chief justice, for he did rightfully administer for that time.

the writ shall abate, else not, as was of old conceived. *Stubb's v. Rightwife.* *Trin. 30 El.* *Cro. El. 102.* *Jud. that defen. respondeat ouster.*

Vid. 8. 185.

AS for the third, *viz.* How far this executor of his own wrong becomes liable and obnoxious to suit; consider we these things.

3 Point.
How far liable to creditors.

First, He becomes subject both to the action of the executor, who hath right to the goods wrongfully intermeddled withal by him, though it were before proving of the will; and also to the action of the creditor, who hath right to the satisfaction of his debt.

Secondly, As touching the measure how far he is engaged, doubtless he is not by his wrongful administering become chargeable with the whole account of the testator's debts; but only

so far, and with so much thereof, as the goods which he so wrongfully administred amount unto. (Yet he must look to his plea, else by it he may draw all sued for upon himself; as if he deny his being executor or administrator.) And this seems to me proved by the case in the time of *Edward* the third, where the inquest found not only the administring or intermedling by the executor wrongfully, but found also, by direction of the court, (as it seemeth) what the value was of the goods so wrongfully administred, which had not been material, if the administring of a penny had made one as far chargeable as the administring of a pound. Besides, if it be so, that a rightful executor wasting goods of the testator to the value of 20*l.* shall be no farther charged than *that* value, then doubtless so shall it be also in this case, for both be wrongful administrations: only this difference there is between them, that in one case the administration is by a wrong person, and in the other case in a wrong manner. Nay, the Lord *Dyer* doth not stick to call him who administreth wrongfully, or in undue manner, expressly an executor by wrong, in the case of *Stocks* against *Porter*, though he were rightfully executor, because he did dispose or execute wrongfully.

Co. lib. intr.
144, 145.
Plus de hoc.

1 El. Dy. 167.
cap. 12.

4 Point.
What acts of his
of force.

AS to the fourth, *viz.* What acts done to him or by him who is an executor of his own wrong shall stand firm and good, as done by or to the right executor: suppose, first, that the deceased were indebted to him 20*l.* who thus usurpeth executorship, whether may he pay himself or not? And this point was in debate

bate in the *King's Bench* between *Coulter* and one *Ireland*, executor of *Hunt*, where it was strongly objected, that notwithstanding the rightful executor or administrator might punish him, and recover against him, for the goods which he administered; yet another creditor suing him as executor generally, and so affirming him to be, (for there is no special form of a writ or declaration to distinguish an executor by wrong from a rightful executor) he stands as against him in the state of a rightful executor, and therefore may first pay himself before he pay others: and of that mind, at the first, were *Fenner* and *Gaudy*, justices; yet did they admit that this payment should not stand good as against the rightful executor or administrator. And *Popham* and *Clinch* held strongly, that neither should it stand good against other creditors; for then every man would rush upon the testator's goods, and be his own carver in payment. And whereas it was said at the bar, that the Lord *Anderson*, upon an evidence at *Guildhall* had ruled it otherwise. *Popham* at another day of debate of the said case, related that the Lord *Anderson* did deny that he ever so ruled, or was of that opinion, and farther, said that both he and Justice *Walmsley*, *Periam* and *Clark*, Barons, did agree with *Popham* and *Clinch* in opinion. After which, Justice *Gaudy*, as also *Fenner*, if I mistake not, changing their opinions, and concurring with the rest, judgment was given accordingly. In the debate of this case question was made, if such an executor by wrong pay a debt to another creditor by specialty, whether this shall not stand firm and good, since he stands liable to creditors so far as the goods by him

M. 4. 41 E.
Co. 1. 5. t. 30.
Mich. Cro. El.
p. 630.

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administred do amount. And it was agreed, by the better opinion at last, that this should stand firm and good; so as if the payment were out of his own goods, he might retain to himself in lieu thereof so much of the goods of the testator; for here he doth not, as in the other case, advantage himself by his own wrong. Yet that opinion, allowing this payment to creditors, must, as I think, be understood with this difference, *viz.* that this payment shall stand as against other creditors, but not as against the right executor or administrator: for then any stranger might usurp the office of executor and take from him that liberty and election, to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before others, in case there were a debt due to him, which were very unreasonable.

*Of addition and alteration by the statute 43. Eliz.
cap. 8.*

5 Point.

Executor of his
own wrong by
statute.

WE having considered what the Common Law is and willeth in the premisses, let us now see what alteration or addition a late statute hath made. In the last parliament of the late *Queen Elizabeth*, consideration being had of subtile getting into mens hands goods of an intestate by deed of gift, or letter of attorney, from one of small or no ability, to whom such subtile contriver hath procured administration to be committed, and so himself would stand free from the suit of creditors, the administrator himself either not being to be found, or not being of any value to satisfy creditors; it was therefore enacted, that every person receiving

ceiving or having any goods or debts of any intestate, or any release or discharge of any debt or duty belonging to him upon any fraud, as aforesaid, or without consideration of or near the value, (except in satisfaction of some just and principal debt, to the value of the goods or debts due from the intestate) shall be charged as executor of his own wrong, so far as the value of those goods and debts amount, deducting all principal just debts to him due, and payments by him made, which a lawful executor ought to have paid. Here have we a touch of all the parts precedent, or at least three of them.

1. We have first a new executor by wrong, though intermeddling under the title of an administrator.

2. We have a limit of the charge by him incurred, suitable to our former expression.

3. Lastly, we have to him an allowance of debts owing to himself, or duly paid to others; which is more than we have conceived allowable to another executor by wrong.

The taking of goods after administration granted, doth not make an executor of his own wrong. *Salk: 313.*

C H A P. XV.

Of pleas by executors, and which be best, which most prejudicial to them.

SINCE amidst the pleas pleaded by executors there is such difference, as that some induce one kind of judgment, some another, some drawing

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drawing more loss and burthen upon executors than others: let us consider of the differences, so as light may be taken to chuse the safest or fittest for each case.

Plea denying the
executorship, 21
H. 6. 19, 20. Bro.
62. 2 E. 4. f. 4.
19H 7. 15. Libr.
intr. 332, 333
33 H. 6. 33, 34.

If an executor do utterly estrange himself from the executorship, saying, that he was never executor, nor ever administred as executor (for that must be added) then if the issue be taken upon the plea, and it be found against him, the plaintiff shall have judgment to recover, not damages only, but even the debt itself, out of the proper goods of the executor, if none of the testator's can be found to satisfy it. And this shall be thus not only where it is found that the defendant was made executor by the *will*, and proved it, and so could not chuse but know it; but even also where he had never proved the *will* whereof he was made executor, nor ever administred by virtue thereof: yea, though he did before the ordinary refuse to be executor of this *will*, or to intermeddle with the execution thereof; yet if any other named executor with him did prove the *will*, or did not refuse to be executor, let such other refuser take heed of pleading that plea. For truth is against the first part of his plea, *viz.* that he never was executor; and so the verdict, which must be *Veritatis dictum*, must needs pass against him, and make his own goods liable as well to debts as damages. What if no other were made executor, but *this* only who refused before the ordinary? May he safely plead that he never was executor? I think not, since he so was executor before his refusal, that he might have released all debts due to the testator, and given away all his goods; therefore I think he must plead specially,

He was suable as soon as the testator was dead.

tially, shewing his refusal, and not generally deny his being executor. Nay, admit he never was once named, made, or intended to be made executor, yet having pleaded this plea, that he never was executor, nor administered as executor, if it shall be found by verdict that he did administer or intermeddle as executor, the same blow or burthen falleth upon him: for then the later part of this plea is found untrue, yea the whole upon the matter, for by this administering he became an executor of his own wrong, and the denial of this executorship by wrong or usurpation shall be as penal to him as the denial of a rightful executorship. The like law where the executor pleads a release made to himself, or a payment of the debt, or other performance of the condition made by himself. Nay, I find in this later case the judgment entered generally against the defendant, as against another for his own debt, not being executor. And the reason why the law makes these so penal to an executor is, because his plea is not only false, but the falshood thereof was willful, since it must of necessity be known to himself to be so. And lastly, for that all these pleas, if they had proved true, had been perpetual bars, at least against the defendant: the first indeed had not been a bar against another, being in truth executor or administrator. But if the executor had pleaded a release made to his testator, finding such one among his writings, which yet was either forged, or never both sealed and delivered by the plaintiff as his deed? or if he plead pay-

The plea of ne unques Executor is that he never was executor, nor ever administered as such. Co. Ent. 144. But if he did it as administrator, it is otherwise; yet see that specially pleaded, Co. lib. intr. 148. a. Lanu and Aldred.

See Co. lib. intrat. Judgment so entred. 145. b. Read and Carter's case. Hill. 41. in C. B. Rot. 401. De bonis & catallis que fuer. præd. (testator) tempore mortis suæ in manibus præd. def. administrand. &c. Si tantum inde in manibus suis habeat, &c. Et si non habeat, tunc debitum & dampna præd. de bonis & catallis ipsius def. propr. levand, &c. Reade's case. Ne unques, executor pleaded. Co. Lib. Intr. 29 a. not first de bonis testatoris si, &c. See Bro. Ex. 22. these reasons: for this d. ff. 33H. 6. 23, 24.

So of other perform. Co. Lib. Intr. 153. and 6E. 4. 1. 7E. 4. 8. That the book contrarily reported, 34H. 6. 22, 23. is erroneous, as was descried by Fitz. & al. 23 H. 8. the record being not so as the book saith the judgment was.

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ment made by his testator; neither of these pleas found against him shall cause the judgment to fasten upon his own goods: so if he denied the bond or bill, whereupon the suit is grounded, to be the testator's deed. For in all these cases the truth being not known to him, he might honestly and reasonably conceive it to be as he did plead. But what if he plead fully administered, and this be found against him, which rested in his own knowledge? Shall not this false plea expose his own goods, in defect of his testator's, to the satisfaction of this debt? No, it shall not, for that though this were a false plea, and that within his own knowledge, yet was it not a perpetual bar; for if it had been so found as was pleaded, yet *Assets* coming after to the hand of the executor, the plaintiff should then have relief and satisfaction out of these since accrued *Assets*. If any ask how *Assets* may after come, I will give him two or three instances. First, it may be by recovery of debts before withholden, or of damages for goods taken away, or by voluntary payment of a debt not before due, for that the time of payment was not come. Secondly, if the testator, having a lease for twenty years, did demise the same to J. S. for the whole term, if he so long should live; if he were alive in time of the former verdict, but now is dead, the term continuing; this is now *Assets*, which before was not, whilst it was but a possibility of a term.

Lib. Intr. 147, Other instances might be given, but these may suffice. If the executor pleaded that the testator
 149. This good, though the judgment were by non sum inform. and an averment that it was without Covin. Co Lib. Intr. 152. on demurrer. 11 H. 4. 6. There a Cap. ad sat. was awarded for the damages.

tor

tor stood bound in such a statute, or that there was such a judgment against him of debt to the king, beyond the satisfaction whereof the goods would not reach; this is in effect a *fully administered*, though special, and not general; and the law is alike (as I take it) in all these cases, as to the not making of the executor's goods liable: But in all these cases, though the debt shall not be adjudged upon the executor's own goods, yet the damages shall, in default of the testator's goods to satisfy them. And in these cases it is not material whether the judgment passed upon trial or demurrer, Nay, if the defendant executor plead no plea, but confess the action generally, or be condemned by *Non sum informatus*; the judgment is the same, *viz.* to recover the debt only out of the testator's goods, and the damages of the executor's goods in default of the testator's. What if the executor defendant confess that he have *Assets* to the value of part of the debt, not of the whole? There for so much as is confessed the plaintiff may pray, and have judgment presently without damages, and may maintain for the residue of the debt, that the defendant also hath *Assets* for the rest, and so go to trial; as appears both by the printed book of entries, and other manuscripts which I have. But what if this trial pass for the plaintiff? Shall he then have an additional judgment for damages in respect of the former? I think he shall have costs, which commonly run with or in the name of damages; but without a writ to inquire of damages, none being found by verdicts, the court doth not usually adjudge damages. Yet in the book of *Entries* I find 6 s. 8 d. damages assessed by the court upon a confession

But he may, I think, forbear so to do, and to the judgment for part that when more assets come he shall have more. Lib. Intr. f. 223. In Tresham's case defendant pleaded several statutes and recog. plaintiff replies satisfaction, and being made for performance of Covenants performed, judgment on demurrer for plaintiff is to recover debt and damages de bonis quæ fuer &c. Si tantum inde in manibus suis habeat, &c. Et si non habeat tunc dampna præd. de bon. & cat. ipsius def. propr. levand. Co. Lib. Int. 152. Brookesby and Tresham.

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M.28H 6. Ro.3.
321. Lib. Intrat.
329. 2.

cession in a *Writ of rationab. part. honor.* against executors, and this hath much affinity with an action of debt. Yea, in the very action of debt where the jurors for miscarriage after their departure from the bar were fined, I find that the plaintiff renouncing the assessment of damages by them made, and praying the court to assess the same, it was done accordingly: but this was a special case.

Whereas we before shewed that an executor denying his executorship shall, if it be found against him, pay the debt of his own goods for his false plea; this thereabout occurreth to be added, *viz.* that *that* is only where the immediate executorship of the defendant is denied. For if *B.* be made executor by *A.* and *B.* dying makes *C.* his executor; now if *C.* be sued for the debt of *A.* as executor of *B.* executor of *A.* and he denieth that *B.* was executor of *A.* which by consequence is a denial of his being now executor of *A.* yet if this fall out in trial against him, he shall not in his own goods stand liable to this debt, because it is possible that he might not know to whom his testator was executor. So if *A.* made *B. C.* and *D.* his executors, and *E.* is sued as executor of *D.* the surviving executor of *A.* if *E.* deny that *D.* his testator survived *B.* and *C.* by consequence whereof he denieth the truth, *viz.* that the executorship of *A.* is devolved to him, yet shall not this, found against him, charge his own goods; for he might be ignorant of this point in fact, *viz.* whether *B. C.* or *D.* lived the longest. And here he denied not his own immediate executorship, but a mediate or more remote executorship. And so, I think is the law, where *C.* being sued as executor

See Lib. Intr. 322.

executor of *B.* executor of *A.* he pleads that *A.* by a later testament made himself executor, which is found against him; so as here he falsely pleaded, and pretended himself to be the immediate executor of *A.* and so denied the mediate executorship, *viz.* of *B.* to *A.* and of him to *B.* Yet *Quere* of this; for why should not as well his false making himself an executor immediate to the indebted testator charge his own goods, as well as his false denying of that executorship; since both pleas tend to the overthrow of the plaintiff's action, and each equally rested in the defendant's knowledge? But this difference is between them apparent, *viz.* That the denial of executorship, if true, is an utter and perpetual bar to the plaintiff, as against him so pleading; but the affirming of an immediate executorship, where he was sued as executor mediate, doth not so, if true, but directs the plaintiff to a better writ or action, *viz.* against him as immediate executor to the indebted testator.

Whereas we have before touched upon the coming of *Assets* futurely to executors, I think it is not amiss to consider a little the form and frame usual in pleas of fully administered, which thus run, *viz.* *Quod die impetr. &c. plene administravit omnia bona & catalla quæ fuerunt præd. S. temp. mortis suæ, & nihil hab. de bonis, &c. quæ fuer. præd. S. temp. mortis, &c.* Lib. Int. 151.

Thus tying his denial upon the things which were the testator's at the time of his death, what if then the executor have, at the time of this plea pleaded, goods which were not the testator's at his death, but since accrued, as before is shewed; or perhaps a lease for years sold by the testator, upon condition to be void, if five hundred pounds

7 H. 4. 39.
Bro. 50. This plea is not good, per Cur. because some may have since accrued.

pounds not paid at such a day, which happening after the testator's death, and default made, the term returneth; or, if the executor by a writ of error reverse a judgment given against his testator for two hundred pounds, and so is restored thereunto? May the plaintiff now reply generally, that he hath *Assets* which were the testator's at the time of his death? How can the jury so find, when the truth is not so? Surely this case is not common, nor can I shew a precedent of a special plea therein. But in reason methinks it should be specially, and not generally, pleaded and set forth in the replication. And in case where one sued as executor denieth that he was ever executor or administred as executor, I find sometimes the replication general, that he did administer, without shewing wherein or how; and sometimes special, shewing what thing was administred, and where. Here note, that the executor defendant denying (as he must) two things, *viz.* 1. That he ever was executor. 2. That he ever administred as executor: the plaintiff in his replication is tied to maintain but the one of them, as the truth of the case is: that is, if in truth the defendant where made executor, but never did administer, now it must be replied, that he was made executor at such a place, without speaking any thing of his administering: on the other side, if he did administer, but was not made executor, then only the administering is to be replied. But if it shall be found that the defendant had administration to him committed, and so administered by virtue thereof, then is the verdict to pass for the defendant, for this is no administering as executor; and upon a general denial thereof

Lib. Intrat. 322.
a. b. but a place
must be shewed,
So 11 H. 6. 19.
20. Br. 62.

Replication only
to the admini-
stration. So done
Co. Lib. Intr.
144. b. Read v.
Carter.

thereof this may be given in evidence, as the Lord *Dyer* reports to have been resolved. But if the plaintiff do in his replication maintain both the points, shall this make his plea double? Methinks it should; yet I find it so replied, and no exception taken for the double-ness, *Trin.* 17 *H.* 8. *Rot.* 28.

Mich. 13 & 14
El. Dy. 30.

Lib. Intr. 3 12. b.
Tr. 37 *Eliz.*

A sole woman being executor, maketh a deed of gift of the testator's goods in trust, but continueth possession of them, and marrieth *J. S.* who also hath possession of the goods, and in an action of debt by a creditor fully administered is pleaded; now upon evidence the verdict shall pass for the plaintiff; for this alienation, being fraudulent; was void to all creditors, and so as to the plaintiff the goods continued the testator's, and so *Assets* in the defendant's hands, as was held in the *Kings Bench*. If fully administered be pleaded where the defendant hath *Assets* for part, but not sufficient for all, and so it is found; yet shall not judgment be given for the whole, but for part presently, with a farther award, that when more shall come to the executor's hand, the plaintiff shall then have farther judgment for the rest: so as that false plea doth him no prejudice, but makes him in as good state (the charges of trial excepted) as if he had confessed himself to have part. And I think the plaintiff upon that confession of part may pray the like judgment, without maintaining that the defendant hath sufficient for the rest; for if that be not true, why should he be put to the charge of a trial by jury? Yea, Sir *Edward Coke*, at the bar, *Tr.* 36 *Eliz.* said, that where fully administered is pleaded, the plaintiff is not tied to maintain the

Yet *Finch*, 46.
E. 3. f. 9, 10.
held the contrary, viz. that judgment should be of the whole, but execution only for so much, and a *Scire fac.* for the rest when more *Assets*.

See *Coke*. 1. 8.
fol. 134.

contrary,

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contrary, but may presently pray and have judgment to recover it when *Assets* shall futurely come to the defendant's hands: which was denied by some. But truly methinks the law should be as he said as well as in the former case, where for the part which the defendant had not *Assets* to pay, it was done, upon verdict so finding. But there as I conceive, it was not a present judgment, but an award that he should have judgment futurely; so as after when *Assets* come to the defendant's hands, the plaintiff must have a *Scire facias* against the defendant, to shew cause, not why he should not have execution, but why he should not have judgment, as I take it: yea, where it is found for the defendant that he hath fully administred, yet was it held by all the justices, 33 *H. 6.* 23, 24. and by *Prisot*, 34 *H. 6.* 24. that when *Assets* after come to his Hands, the plaintiff shall have a *Scire facias* to have satisfaction out of them: but that *Markham*, *Yelverton* and *Forrescue* were of contrary opinion, and so was the whole court, 4 *H. 6.* fol. 4. And it stands with great reason, that where, upon a verdict fully found against the plaintiff, judgment is given *Quod nihil capiat per breve*, there he cannot have any writ to execute the judgment for him, but is put to a new action of debt: yet where it is found that the defendant hath *Assets* for part of the debt, but not sufficient for the whole, there it is very congruous that the plaintiff have presently judgment for part, and after, when more cometh, then by *Scire facias* against the defendant obtain judgment and execution for the rest: for here both verdict and judgment were for the plaintiff against the defendant, whose plea,

So 19 *H. 6.* f. 37.
 8 *E. 4.* fol. 25.
 See judgment so
 entr. 151. b.
 So 7 *E. 4.* f. 7.

plea, that he had no goods, was false, and so found by the jury. And this difference was strongly avowed by Serjeant *Henden*, *Mich.* 33, 34 *Eliz.* and after approved by *Fenner* Just. 36 *Eliz.* none contradicting it: yet a book was cited, that the plaintiff recovering so much as was found in the executor's hands, he should be amerced for the residue; which *Popham* chief justice denied to be law. This 21 H. 6. 40, 41.

Ideo Conf. est, quod præd. les plaintiff's nihil capiant per breve suum præd. sed sint in m'a pro falso clamore suo inde, Et præd. les def. eant inde sine die, &c. Co lib. intr. 151. b. There was a verdict for the defendants executors of an executrix, *quod non habuer. bona, &c.*

C H A P. XVI.

Where judgment shall be against the executor's own goods, though no plea of the defendant nor vacation do so occasion: and of the several manners of judgment in several cases.

HOW by wasting, called by us commonly a *Devastavit*, an executor may draw down the execution upon his own goods, hath formerly been handled and discoursed of; as also what kind of pleas do make the executor's own goods liable to the debt, and what not. Now let us see where, without misadministring, or mispleading, yet the nature of the action shall lay the whole debt or thing recovered upon the executor's own goods. And this we shall find in some few cases. 1. Where an executor is sued for rent accrued and behind after his testator's death, upon a lease for years made to the testator and by him left to his executor; here

For rent behind since testator's death.

the suit is in the
debet & detinet

it shall be adjudged and levied upon his own goods; for that so much of the profits as the rent amounted to shall be accounted as his own goods, and not his testator's; therefore he is to be sued as well in the *Debet* as in the *Detinet*, where in other cases he is not, but in the *Detinet* only, being sued as executor. So if any thing delivered to, or detained by his testator, come to his hands, and he still detains the same after the demand, and be thereupon sued in an action of detinue; for this is his own act. Nor in this case need he to be named as executor, for he shall not answer damages for his testator's detaining. So if he assume to pay out of his testator's *Assets*, and be sued upon this *Assumpsit*, and which debt is to be recovered in damages, and that out of the executor's own goods; yet is this action, and the assumption, which is the ground thereof, founded in the executorship, and his having *Assets*; for if either he had not been executor, or if he had not *Assets* at the time of the promise, it had been *nudum pactum*, and would not have bound him, nor given good cause of suit. Nay, to go farther, in the case of assumption by the testator, and suit against the executor thereupon, we find the judgment in Mr. *Plowden's* Commentary given against the executor generally, as if he had not been an executor, not fixing it upon the testator's goods; yet there the very debt itself is included in the damages. But contrarily was it after in the seventh year of the late king. *viz.* Judgment given, that as well the damages as the costs should be levied of the testator's goods, if so much in value of them were in the defendant's hands; and if not, then were costs only of the goods of the executor. And this surely is the righter and more just way; fo
ther

5 Mariae. f. 112.
Read and Nor-
wood's cas.,
Co. lib. Intr. f.
1, 2.

there is no reason that upon a promise, more than upon a bond, the law should cast the whole debt upon the back and estate of the executor. But perhaps the two judgments may be reconciled thus: the later was given upon a verdict, *Non assumpsit* being the issue, and there the jury assessed damages in certain, *viz.* 523*l.* with the costs; so as here the judgment was compleat and full, *viz.* to recover the said sum: but in the other case the judgment was had upon a demurrer, so that the damages not being known, it was generally, that the plaintiff should recover his damages against the defendant. *Sed quia nescitur quæ damna, &c.* Because it appeareth not to the court what the damages were, therefore a writ was awarded to enquire of damages, upon the return whereof executed, the judgment was fully and compleatly to be given of a sum in certain: which second judgment it appears not by the book in what manner it was entered, and therefore might perhaps be then agreeable with the other. And that the said first judgment, before damages enquired of, is not a plenary and full judgment, but an award of judgment, hath been divers times resolved; and that therefore any defect and insufficiency in the declaration may be shewed time enough after the first, and before the second judgment: Yea, if the plaintiff die before the second judgment, though after the first, † the action falleth to the ground: so if the defendant die: otherwise of death after full judgment. But this notwithstanding, and howsoever there were done

Tr. 30 Eliz.
Pasch. 33 E. in
Com. Ban.

† But see the Stat. 8, 9. Will 3 ch. 10. in what cases actions shall not abate.

upon the second judgment, methinks it were righter and fitter that the damages should be had and levied out of the testator's goods, for whom and in whose right the executor is sued.

For breach of
covenant since
the testator's
death.

Another case there is, wherein the judgment must be, as it seems, against the executor's own goods, *viz.* in an action of covenant for a breach of covenant since the testator's death: for so was it held both by all the judges of the *Common Pleas*, except the Lord *Dyer*, and by the prothonotaries in the late Queen's time; where the case was of an house upon the lease negligently burned in the executor's time; for which damages only were to be recovered. And sometimes where the executor himself is to bear the burthen, I find the judgment entered, that the sum recovered shall be levied of the lands and goods of the executor.

Lib. intr. 329. a.
& b. de terris
& catalis, &c.

Judgment pleaded for 5000 *l.* on a note payable with interest, which interest amounted to 1700 *l.* was adjudged a *Devastavit*; for the administrator should not have suffered so much interest to be in arrear. 1 *Lev.* 39.

C H A P. XVII.

Of women-covert executors.

THere being two kind of persons who have some disability upon them, *viz.* Feme-coverts or married women, and infants, touching whom we find in many places question and debate in our books, we will consider of them by themselves, or apart from others; yet not joining them together neither, but each by himself separately.

First,

First, Therefore, of feme-coverts; touching whom we will consider these three things.

First, whether they may make *wills* and executors with or without their husband's assent; and how, whereof, and in what cases.

Secondly, whether they may be made executors without their husbands assent, or how their husbands may hinder it.

Thirdly, what acts in execution of the executorship they may do without their husbands, or their husbands without them.

A woman married, or feme-covert, we know is *sub potestate viri, cui in vita contradicere non potest*, as saith the writ given by the law to the wife for recovery of her land after her husband's death, being aliened by him. Therefore it is, that judges, when a woman is to acknowledge a fine of any land, do examine her apart from her husband, to know whether she be willing, or come to do it by the compulsion of her husband: it is therefore hard for her to have freedom of will, and consequently freedom to make a *will*. Besides, all her moveables or goods personal, which she had at the time of her marriage, otherwise than as executrix or administratrix are by the law totally devested out of her, and settled in the husband as fully *ipso facto* upon the very marriage, as any other that were his own before. Of these therefore she can make no disposition, no more than of other her husband's goods. But in case she do by *will* bequeath them, although the *will* and the gift be void, yet if the husband, as the case was in the time of *Edw.* the second, do after his wife's death consent to this her *will* and gift, by delivering of the goods bequeathed, after her death, or assenting that the

SeCt. 1.

Sola & secre è
examinata.

D.bts except,
which are not
properly goods.

5 E. 2. Fitc.
Devise. 24.

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legatee take them by virtue of such *will* and gift; this amounteth to a new gift by the husband. If a woman have a lease, an estate by extent, a wardship, the next avoidance of a church, or other chattel real; these are not devested out of her into her husband by marriage, but in case she overlive him, they continue to her as before; no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his life-time, though not by his *will*: yet such a woman in her husband's life-time could not, of, or for these things, without her husband's assent, make an executor or *will*, but she dying before him, they would by the operation of law, accrue to him. And here then observe a case, though not frequent, yet full of mischief when it happens: suppose that a woman indebted a thousand pounds, and having leases and moveable goods to the value of three thousand or four thousand pounds, marieth with *J. S.* and then dieth before the debt recovered against her; in this case the husband shall have and go away with all this value of his wife, and is not in law liable to pay one penny of her debts, because he is neither her executor nor administrator. What the *Chancery* could do, or rather what the lord chancellor or lord keeper would do, in this case, I will not take upon me to say or determine. Another sort or kind of goods, or rather interests, a woman may have, *viz.* debts or things in action, which as the former, are not devested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's assent, although they be one degree farther from the husband than the said chattels real; for that
though

During her life he is, but not after, and if he was her executor or administrator, such goods could not be assets.

But the husband may receive them or release them
12 H. 7. f. 22.

though the husband do over-live the wife, he shall not be entitled to them as to the former. But if his wife make him executor, as she may, or if after her death he take administration of her goods; then, as he is thereby entitled to them, so is he liable also to pay her debts out of the same, when he shall have received them.

The husband was sued in spiritual court as executor to his wife.

Lastly, *Dato* that a woman-covert is executrix to some other person, and in that right hath goods moveable; these are not devested out of her, because she hath them not merely to her own use, but as representing the person of another: but whether then may she without her husband's licence or assent, in respect of her being an executor, and for continuation of this executorship, make executors, and consequently a will, or not? Hereabout hath been much diversity of opinion. Some books generally speak, that the wife may make an executor, but speak nothing of the husband's assent, whether necessary or not. Elsewhere we find it mentioned, that if the husband after the wife's death countermand (some books, false printed, say command) the proving of his wife's *will*, then it looseth all force, or becometh void and of no value: but in this case is no mention in what state this wife stood, *viz.* whether she were executor or not, no not so much as whether she had any thing in action, or chattel real or not, so as nothing in particularity can be grounded upon that case. But there are express opinions, that the husband's assent is absolutely necessary even in this case, so as without it the wife's making an executor shall be merely void, and, consequently, he to whom she was executor shall now by her death be dead intestate. And of

So she is often to former husband and to father, &c.

39 H. 6. f. 27.
34 H. 8. f. 8 Bro.
Testaments, 21.

18 E. 4. f. 11.
Vavasor, just.

4 H. 6. f. 31.

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this opinion was *Babington* chief justice, in the beginning of *Henry* the sixth his time. Yet contrary hereunto was the opinion of *Fineux*, chief justice, in the time of King *Henry* the seventh, *viz.* that where the wife is an executor, she may also make a *will* and an executor without any consent or assent of her husband. And to this opinion doth master *Perkins*, after consideration of the books on both sides, incline. But some will say, that since all this, in the late Queen's time this hath been contrarily resolved, *viz.* in the case between *Andrew Ognell* plaintiff and *Underhill* and *Appleby* defendants; in the end of which case it is in express terms said to have been then resolved, that a feme covert or married woman could not make an executor without the consent of her husband. To this I answer, that this case is to be construed with relation *ad materiam subiectam*, *viz.* to the matter and point in question and under consideration, which was that state of a woman whereof we have before spoken, *viz.* one having things in action, debts or duties to her belonging, as there in particular it was arrearages of rent due to the woman before marriage. As for the point of a woman executor to another person, it was never in that case under † disceptation, nor once mentioned in the debate or arguments thereupon. Now considering the very form and phrase of judgments at the common law, which are thus, *viz.* *Ideo consideratum est per Curiam, &c.* not, *Adjudicatum est*, that is, it is considered

† [Disceptation] this word is obsolete, it is *disceptatio* in latin, and signifies a disputing, debating, or reasoning. Ainsworth's Dictionary.

by the court, not in exprefs terms, that it is adjudged ; this, I fay, well obferved, (as to me it feems very remarkable) gives us to know, that no more is adjudged than is confidered of, the judgment being contained and clafped up in the words *Consideratum eft*. Wherefore fince in *Ognell's* cafe the point of a woman covert's ability, in cafe where ſhe is an executor, to make a will and executor, hath not been confidered of, (the eyes, tongues nor thoughts of the judges being once fet upon it,) it cannot be that that point is there refolved or adjudged. Befides, even in a few words expreffing, as to me it feems, the reafon of that refolution, it appears not to have been the intent of the judges, that the ſame ſhould reach or extend to this cafe of a woman-covert executor: for it is added (as the reafon of the judgment, in my conceiving) that the adminiftration of the wife's goods doth of right belong to the husband ; which amounts to this, in my underftanding, *viz.* that where the wife's making of a *will*, and confequently of an executor, may be prejudicial to her husband, and prevent him of ſome benefit or advantage, or tend to his lofs and difadvantage, there it ſhall not be available or effectual without his affent ; and therefore not in the cafe of her, who, having debts or duties to her due, would, by making another to be her executor, exclude or preclude her husband from that benefit which to him ſhould pertain as adminiftrator of her goods. Now as for the goods, debts or credits to her as executor to ſome other pertaining, no benefit could redound to the husband by having ſuch adminiftration of his wife's goods, for thoſe ſhould go and be to the next of kin of the wife's
testator,

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testator, taking administration *de bonis not administratis* of him, if she have no executor; and therefore her making executor, as touching these, brings no hurt or prejudice to her husband, and so is out of the reason of *Ognell's* case. Since then it is so, and since the law favoureth *wills*, and it was by implication part of his *will* who made her executor, that she should have power to continue his executorship, by making another to succeed therein after her decease, for performance of his *will*; why should the law give to the husband, who can receive no prejudice thereby, power to give impediment thereunto? For, *Frustra est inutilis potentia*; even reason itself stands and awards against him in this case a *Quare Impedit*, or rather a *Non Impedit*, as to me it seems. Wherefore to conclude, I take it that the opinion of *Fineux* is good law in that point of a feme-covert executor, though not in the other point, where she hath only debts or things in action to her self due; for therein the said resolution in *Ognell's* case, grounded upon good reason, gives me satisfaction to differ from *Fin.* who making no difference between the cases, held the husband's assent needless in both. *Posito* then the wife of *J. S.* having debts due to herself, and being also executrix to *J. D.* makes without her husband's assent *J. N.* her executor, and dieth; what shall we now say? Shall we say, that as touching the goods and credits or things in action to her as executrix of *J. D.* pertaining, this *will* stands good, and *J. N.* as her executor, may prove it, contrary to her husband's *will*? And that as to the credits to herself in her own right pertaining, the *will* is void, and thereof her husband may take administration?

tion? shall She die both testate and intestate, with a *will*, and without a *will*? Shall we have both an executor and administrator? Why not, to several purposes, as well as where an executor is made only for one particular thing or one place, the testator may elsewhere die intestate? And so where the executorship is divided, as before is shewed, and one to whom part is committed will prove the *will*, but the other to whom other part of the executorship is committed will not take it upon him; here must needs be a dying for part testate, and part intestate. *Vide post Sup. p. 20, 21.*

As for the second point, *viz.* wives or women-coverts being made executors, and so having the office of executorship put upon them against their husband's *will*, there has also been diversity of opinions. In the time of King *Edw.* ^{13 Ed. 1. Fitz. Ex. 119.} *1. Brab.* justice, saith she may be executor without her husband, and the administration shall be delivered to her only. And I think he meant that this might be without the consent of her husband, or whether he would or not; for so it is said in the time of King *Hen.* the seventh to ^{2 H. 7. 15. b.} be the law spiritual: and indeed in courts spiritual no difference is made between women married and unmarried, for ought I can find. There a wife sueth, and is sued, alone without her husband; he intermedleth not, nor is intermedled withal, touching the things pertaining to his wife. ^{2 H. 7. 15.} But at the common law it is otherwise; and there, as *Brian*, chief justice, saith, a wife without the assent of her husband cannot be executor, he meaning thereby that the husband may oppose and hinder it; for such a one may be named executor in and by a *will*, without the knowledge

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ledge of her husband. Let us then see how after the death of the testator the husband can hinder her proving the *will*, or intermeddling to administer, since it may be a matter both of much trouble and danger to him to have the executorship fasten upon his wife, and consequently upon himself. On the other side, it may be a benefit and advantage to the husband; and therefore we will also consider, whether the husband may (though his wife would refuse) assume the executorship, and fasten it upon her. The testator therefore being dead, and fame or common bruit carrying it to the ordinary, that the wife of *J. S.* is made executrix; if she come not in *gratis* or voluntarily to prove the *will*, process or a citation is to be sent out of the spiritual court against her, to enforce her coming in to take on her the executorship. She coming may clearly, as well as any other person, (especially if her husband concur with her therein) refuse this office, trust and charge, so as if there be no other executor named, the ordinary must commit the administration. If she should not come and appear, she should be excommunicate, as I take it, notwithstanding any allegation or intimation by her husband of his unwillingness to have her take upon her the executorship. But suppose she doth come into court, and offers herself ready to take the executorship upon her; and on the other side her husband expresseth his disassent thereunto, praying that she may not have the execution of the will to her committed: what will then be done? This, I confess, pertains to another learning, and not to that of our profession. But forasmuch as I find, that in the courts spiritual a wife stands in the same plight

plight and state as a woman sole, the husband not intermedling withal in the affairs of the wife; therefore do I conceive, that in that court the husband's refusal will not be of force to hinder the committing of the executorship to the wife not refusing; at least if their come not a prohibition to stay such proceeding in the spiritual court. But whether a prohibition be in such a case to be granted or not, as I find no resolution in my books, so will I not take upon me to resolve. This stands clear in the rules of the law of *England*, that the wife is under the husband's power, and cannot contradict him in pleading and doing other acts, even touching her own freehold: nay, she cannot take lands nor goods by gift or conveyance without her husband's assent, as the law hath been, and, for ought I know, is taken. But if once the *will* be proved; and the execution thereof committed to the wife, though against her husband's mind and consent, I think it will stand firm; and the husband and wife being after sued, cannot say that she was never executrix. And I doubt whether the wife administering without the husband's privity and assent, although the *will* be not proved, do not conclude her husband as well as herself from saying after, in any suit against them, that she neither was executor nor did ever administer as executor. Yet perhaps this administration by the wife, against her husband's mind, will (as against him) be as a void act; else cannot I see how *Brian's* opinion before cited, *viz.* that the wife shall not be executor without or against her husband's mind, can be law. On the other side, if the husband of a woman, named executor, would have his

wife

33 H. 6. 31. 43.
39 Ed. 3. 1.
27 H. 8. 24.

11 H. 6. 4. The plea is, that the feme did, or did not administer, without speaking of the husband.

33 H. 6. 31.
The husband
may administer,
and prove the
will for his wife.

wife to take upon her the execution of the *will*, and to prove the same, but she will not assent thereunto, (wishing, perhaps, that gain and benefit rather to some of her kindred by way of administration, than to her own husband by her executorship, as sometimes wives accord not well with their husbands;) in this case I think the court spiritual, will not fasten the executorship upon the wife against her will. But *dato* that the husband, though the *will* be not proved, doth administer as in the wife's right, but against her mind and *will*; shall she be now hereby bound and concluded, so as after she cannot decline or avoid the executorship? And surely I think, that during her husband's life she stands concluded at the common law, so that there she shall not be nor can be sued alone an executor, and then being sued with him, she must join in plea with him, *viz.* that she neither was executor, nor administered as executor; and then this act of her husband's given in evidence will, as I take it, cause that the verdict be found against her: not so after her husband's death; for then she may refuse, as the *L. Dyer* saith, and citeth as resolved. These things I thought good to offer to consideration, and so leave them without resolution. Difference perhaps may be where a woman so made executor taketh a husband after the testator's death, before either proving or refusing to prove the *will*, and where she is made executor during the coverture; as there in case of a descent of her land to the heir of a disseisor; for when there is upon her such a state of election, she, marrying before her resolution or determination, doth upon the matter deliver it into the husband's hands:

1 Eliz. Dyer
166. 1. there is
cited.

3 H. Rot. 112.
Nota per bill.

hands : not so where it first findeth and falleth upon her in the state of coverture. If the husband were indebted to the testator, this making of the wife executor is, as I take it, a release in law, as well as if she were the debtor : but if after the testator's death she do marry such a debtor, it is a devastation,

The third point.

Touching the administration or execution of the office of an executor by a feme-covert and her husband.

WE will now come to admit the execution of the *will* assumed by concurrent consent of husband and wife, and the *will* proved with both their likings in the wife's name ; and examine what acts the wife of her self is able to do, and what her husband without her.

It hath been conceived by many of old, and by some of late, that if a feme-covert or married woman executrix release a debt of her testator, or give away the goods which she hath as executor, or deliver a legacy bequeathed, it was firm and good ; and on the other side, that her husband's gift or release was of no value, for that the administration or execution of the *will* is committed to the wife only, And some have gone so far as to say, that she may sue or be sued without her husband, (in the courts of common law, I mean ; for in the spiritual court it is true, the husband is not joined with the wife in suit.) But the law is doubtless in all those points contrary, as not only some opinion also was of old, *viz.* in the time of *H. 7.* but

See 18 H. 6. 4. In debt the plea shall be, that she hath fully administered ; and reply, that she hath Assets, never mentioning the husband.

also hath been in the late Queen's time resolved : for otherwise, if the wife's gift or release should stand good, her act might exceedingly endamage her husband, and make his goods liable to the creditors, the testator's estate being wasted by the gifts or releases of his wife. Wherefore it was held in the said late case, that unless due payment were made to such woman-covert executors, their releases or acquittances be void, and so also their gifts and grants; yea, it was then held, that the husband of the wife executrix may give goods, or make release of debt, at his pleasure. But doubtless by marriage neither are the goods, (though personal) which the wife hath as executor devested out of her, and settled in her husband, as her own goods are; nor, if she die, shall they accrue to the husband, if no alteration were of the property, but shall go to her executor, or to the next of kin, being administrator of her testator, if she have no executor: and so was it held in the first year of *Queen Mary*. Yea, though for any other goods which the wife had in her own right before marrying, the husband alone, without naming the wife, may maintain on action of trespass: yet touching such goods as the wife hath as executor, the action must be brought in the names of the husband and wife, to the end that the damages thereby recovered may accrue to her as executor in lieu of the goods. So also must the replevin for those goods be in both their names. But although the husband be thus named with the wife, yet principally is it the suit of the wife; and therefore in such actions, or in debt by husband and wife, she being executor, if it come

33.H. 5, 31.

M. 31 El. in
Com. Ban. If
the husband be
to avow, it must
be in the right,
of h's wife,
executor or ad-

to trial by jury, the husband being an alien, yet shall he not have trial *per medietatem linguæ*, or *alienigenarum*, that is, by half aliens, as in other cases where an alien is party to a suit is to be had. And where, to a wife made executor, power is given to sell land of the testator's, she may sell to her own husband, as was resolved in the time of K. Hen. the seventh, where the feoffees (it being land settled in use) were committed to the Fleet, for that they would not execute an estate to the husband according to the wife's estate. But of this I much marvel, since the law intends the wife so under the husband's command and subjection, that it holds not her disposition of land to him by will free, nor therefore of force; and how shall this then be conceived to be but a partial sale? Yet *volenti non fit injuria*, and he that will put such power into the hands of a woman under coverture, doth in a manner subject it voluntarily to the husband's will. And it hath been held by some, that even an infant's or feme-covert's conveyance in such case of necessity should stand firm and unavoidable, because of the condition express or implied, that the state should be void if no such conveyance made.

Feme-covert put out money in name of another, but for her own use, he whose name it was put out in, is but a trustee: yet in law it is his money, and the wife hath no remedy for it but in a court of equity. Therefore the husband shall not have it as husband, but he may have it as administrator, *March. 44.*

administrator,
Manfield's case.
Doctor Julier
his case.

10 H. 7. 20.

Bro. Just. Cui in
vita 15 she may
sell to any other,
but not to him.

Fenner Just in
Ban. Reg. Pasc.
27 El. & 34 E.
3. Bro. cui in
vita 15. No pre-
judice to them,
that it be good.

C H A P. XVIII.

Touching infants, and their making or being made executors.

BEing now to consider of disability by age, for want of years in persons making or being made executors; let us first take a view of the several ages of men and women, to several purposes material in the law, judgment, and respect. And first, touching a woman: *Wangford*, in *Henry* the sixth his time shews, and other books approve, that she hath six several ages respected in, and by the law. As first, the age of seven years for her father to have aid of his tenants to marry her. Next, nine years, to deserve dower, that is, that in case she be of that age at the time of her husband's death, she shall be endowed: but not if she be any thing under those years; the law being physically informed, that a woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the parliament in the late Queen's time, when it was made felony to have unlawful carnal knowledge of any woman child under the age of ten years, it being then conceived, as I think, that no such could consent. The age of twelve years is a woman's time for assenting or dissenting to marriage, in more tender years, had. For so it appears by divers books; although Mr. *Littleton* hath here no distinction between male and female. The age of fourteen years is a woman's time

35 H. 6. 41. b.

1.

2.

18 Eliz. c. 7.

3.

4.

time to be in wardship, or not; so as if she be any thing above those years at the time of her ancestors death, she escapeth wardship. The age of sixteen years is her time of coming out of wardship, being once fallen under it: for although had she been full fourteen, she had escaped it, yet not so being at the time of her ancestors death, her wardship lasteth till sixteen years, except the Lord shall sooner marry her. And lastly, the full age of a woman, whereby she is enabled firmly and unavoidably to make grants or conveyances, is twenty one years, as well as for the male; before which time, be it that she being sole make a feoffment or other conveyance, or being married alien her land by fine, and her husband of full age join with her, yet is it *infirm* and *avoidable*.

5.

6:

Now of the male, or man, the first age material, and settledly resolved on, is twelve years; for at that time each male is at the leet, to swear his fidelity to the King. This, women do not, and therefore are they never said to be outlawed, but to be waved, because they have not this admittance into the law which males have. This hath been, as I think, the ground of that speech, that *women are lawless creatures*.

1.

The second age of males is 14 years, accounted by the law the age of discretion especially material to two purposes, *viz.* First, that if one under that age commit an act amounting to felony, yet is he to stand free from the attainder and punishment incident to a felon. Regularly it is thus, but, *Non est regula quin fallat*. One of much less years, having attained ripeness of discretion and discerning, shall incur the like attainder as one of full age: as was resolved in

2.

The Office of an Executor.

3 H. 7. f. 1. b.

the time of K. *Henry* the seventh, touching an infant but of the age of nine years, who having killed another boy of the like age with his knife, and then hiding the slain boy, and excusing the blood found upon him by saying that his nose had bled; it was held by the judges, that he was to be hanged as a felon, his such non-age notwithstanding. The other point, touching which this age of fourteen years is especially material, is touching an heir of lands held by socage: for in case such heir be under that age, he is to be in ward to the next kin; but if he be of that age, he is not to be in ward at all, for that the law judgeth him to be of discretion at those years: and therefore a guardian in socage being in effect but a bailiff accountable, he hath no need of such an one, other than such as himself shall chuse.

3. The third age in and touching males material is fifteen years: for every lord of a manor or one having freeholders in socage, or by knight's service, when his eldest son cometh to that age, viz. fifteen years, is to have of them aid for the making of him a knight, towards which every one holding by a whole knight's fee is to pay twenty shillings, and so ratably for more, more, and less, less; and each holding twenty pound's land in socage is to pay the like sum, and so ratably for more or less.

4. The fourth age of males is the full age of twenty-one years, which maketh him free from wardship, having lands held by knight's service descended unto him, and also makes him able to alien lands or goods makes firm his bonds, statutes recognizances, &c. For although at fourteen the law judges him of discretion, yet
doth

doth it not hold him fully ripe till one and twenty.

The last age of males respected by the law is seventy years : at which time sheriffs are to forbear to impanel them in juries ; and in case they do not, such old man may have a writ to the sheriff grounded upon the statute to that purpose made in the time of K. *Edw.* 1. commanding such sheriff to forbear the impannelling of him, and he may have an action to recover damages upon that statute. This is called by most a *writ of Dotage* ; a word, perhaps anciently taken in good and favourable sense, *pro dote etatis*, viz. a gift, privilege or exemption allowed to age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of the several ages, let us now see wherein and how age is material touching them who are to make, or to be made executors, and what age is required thereabout. Master *Perkins* saith, that one of four years old may make a *will* and consequently executors ; and his reason is, because the executors being to account before the ordinary, it cannot be intended but that the goods shall be distributed for the good of his soul. He speaks as if he only made an executor by his *will*, but did not bequeath any thing, but left all to the executor's conscience and discretion, which is not usual, though feasible, as before I have shewed, or said at least. But admit it were so, and no bequest at all contained in the *will* ; yet since at that age an infant hath no discretion to elect a fit person to distribute his goods, money and other things, nor to make continuation of an executorship to another, to whom perhaps the infant was

5.
Oblitum.
Another of 60.
to exempt from being compelled to serve by the stat. of laborers.
23. c. 1. W.
2. cap. 3. 13 E.
1. No. Na. Br. 165.

Devises f. 97.
No good reason, for one may make an ill account, especially having a child's direction for his doings.

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executor; I cannot see that his *will* should be of any force: but if he be of the age of 14 years, being the age of discretion in the judgment of law, then I should hold him able to make a *will*, although yet he be an infant till 21 years, and can make no gift of land nor goods which shall be of force. And *Babington* chief justice, to other purpose, makes like distinction between an infant of such tender years, and one come to the years of discretion. So also, as before we shewed, it is in the case of felony. And that way also sounds that which *Hank.* says in *Henry* the fourth his time, *viz.* that an infant of 18 years old may be a disseisor; as implying that his years may be so tender, that, as *Candish* saith of an infant in *Ed.* the third his time, he is not to be intended able to know or discern between good and evil: methinks therefore he should be at the least of the age of discretion, *viz.* 14 years, who should be able to make a *will*, and consequently an executor. And the custom for an infant of fifteen years old to bequeath by *will* hath, as to me it seems, affinity with this opinion, though there the case was of land in a borough devisable by custom. And that way reflecteth the case in the time of King *Henry* the sixth, where it was said, that an infant under fifteen years of age should not wage his law, *viz.* take an oath to acquit himself of a debt, or excuse his default in an action real. And farther reason of this opinion will arise out of the consideration of an infant made an executor.

Now touching an infant made executor, how young soever he be, the making of him so is not void; but yet the execution of the *will*, which

Vide post. Sup.
p. 3, 27.

9 H. 6. f. 6.

2 H. 4. 22.

40 E. 3. 44.

37 H. 6. 5.

21 H. 6. f. 47. 6.

Action against
dependant ad-
ministrators du-
ring the minority
of A. and the
plaintiff shows

which is the performance of the office of an executor, shall not be committed to him till he come to the age of seventeen years, by the law spiritual, and till then (for that he is not able to do the part of an executor) administration is to be committed to some other: yet if it be a woman infant who is so made executrix, in case she be married to a man of seventeen years old or more, now is it as if she were of that age, and her husband shall have the execution of the will; and if administration were before committed during the minority of the woman, it shall now cease, as is said in *Prince's case*. Yet I do a little marvel at these opinions, considering that these things are managed in the spiritual court, and by that law; and it intermeddles not with the husband in the wife's case: now by that law, and not our common law, comes in this limit of 17 years. And I have seen it otherwise reported in and touching the last point.

Farther touching infants executors, and under the age of seventeen years, this is to be noted, *viz.* that such an one is not able as an executor to assent to a legacy, so as it may by virtue thereof settle in the legatee. Also if administration be during such minority committed with special words of restraint or limitation, *viz.* that it is done to the use or profit of the infant executor, then no sale of lease or goods, or assent to legacy, by such administrator, will bind or prejudice the infant-executor; otherwise, perhaps, if the administration during the minority be committed generally. And if the testator himself, making an infant executor, doth also appoint another to be his executor during his nonage, expressing it to be only for the be-

that the said A. at the time of the writ brought was and is under the age of 21 years, and verdict pro quer. Judgment arrested for the administration ceaseth at 17, and so doth the action against the administrator. 2 Brownl. 247. Brownhead and Spencer. Co. Lib. 5. fo. 29. b.

M. 41. & 42 El.

Co l. 5. f. 22. But payment is to be made to the executor, and not to the administrator, M. 15 & 16 El. in Com. Bank. Rep. p. 67. Co. l. 5. f. 29.

Co. l. 6. f. 672.

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nefit and behoof of the infant-executor ; I doubt whether this temporary executor stand any whit restrained from what pertains to the power of an absolute executor : for there may be, perhaps, difference between him to whom the owner of the goods commits the government of them, though but for a time and in special manner, and an administrator so especially made by the ordinary, another being presently by the *will* of the owner or testator to have the administration, in whom for a time legal defect is found. But now let us pass over this age of seventeen, and consider of the infant between that time of his being admitted to take upon him the executorship, and his accomplishment of his full age of one and twenty. First then, suppose that he doth release a debt due to his testator ; whether shall this be good to bind him, and to discharge the debtor, as well as if the executor had been of full age, he now having proved the *will*, and being by the law spiritual approved an executor able ? And this point coming in question in *Russel's* case in the late Queen's time, consideration was had of divers good reasons for enabling of this release † ; as that an executor represents the person of his testator, and in his right and power doth these acts and not in his own, and therefore his infancy, which is a state or condition of his own natural person, shall no

H. 16 El.

† Debt on bond to testator, defendant pleads a release by one of the plaintiffs (executors), plaintiffs reply the release was without cons. and he who released was within age at the time of release made ; and on demurrer it was adjudged for plaintiffs, that it was a void release. *Cro. El.* 671. *Knot v. Barlow*, *Pas.* 40 *El.* in *C. B.*

more

more difable him than it doth the king, a *mayor*, or other head of a corporation. Also divers ^{16 H. 6. 45, 21.} books were found to run that way, as well ^{E. 3. 25.} in the case of an infant, as of a feme-covert. But upon great deliberation in the *King's Bench*, and upon conference had with the Lord *Ander-son*, *Manwood*, and other justices, it was resolved and adjudged, that the release of an infant executor, without payment of the debt and duty, would not bind or bar him. 1. For that if it ^{Co. l. 5. f. 27.} should, it would be a waisting or devasting of the goods of his testator, and so would charge his own goods. 2. It would be a wrong, which an infant could not do by his release. 3. It was no pursuit nor performance of the office or duty of an executor, but the contrary. And upon this judgment a writ of error was brought in the *Exchequer-Chamber*, where it was agreed by all, that the release was not effectual nor binding, so as this point now had the resolution of all the judges of *England*. But it was agreed, that if payment or satisfaction had been made, then the infant-executor might have made a good acquittance and discharge; and indeed, payment itself, if proved, brings discharge enough, except in the case of a single bill. Note, that the principal case adjudged was not a release of any debt or duty by specialty, but of trespass in conversion of goods found or taken in the testator's life-time. But *Posito* that this infant had assented to a legacy, whether will this bind him or not? For in the case of *Russel* it is said, that, all things which an infant doth according to the office and duty of an executor will stand firm; now it is part of his office to pay and execute legacies. Yet since this act amounts

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amounts to a vastation or wasting of the testator's goods as well as the other, in case there remain not goods sufficient for payment of the debts, and consequently here, as well as in the other case, the infant's own goods would become liable to his testator's debts, I doubt, and incline, that it is not, nor can stand effectual: for except in the other we admit a want, or possibility of want of *Assets* or goods, the release could neither hurt the infant himself, nor do wrong to any other; and that admitted, this case is of like prejudice. Yet if these *Assets* should be void, so also would be his payment of legacies: and how then were he an able executor at the age of seventeen years, to sue and to be sued for debts and legacies? And if upon suit it cannot be shewed that debts will take up all, or disable the payment, then, haply, he may be forced to pay. *Quære*, notwithstanding, whether these acts (though voluntary) stand not good upon *Bene esse*, or conditionally, *viz.* if there be besides goods sufficient, &c. or that else the non-aged executor may have an action of accout for the money by him paid to the legatee, and also avoid his assent, where that is only needful. But doubtless, neither the assent of such executor before the age of 17, nor any payment of a debt to him, could be good, although such acts to or by another executor before the proving of the *will* would stand firm and good; for this infant wants not only proving, but also ability to prove his testator's *will*; yea, the *will* stands suspended, and the testator as it were intestate, whilst the administration stands in force, so as during that time nothing can be done by any as executor: and therefore there

there is great difference between the cases. What if payment of a legacy be made to an infant, can he make a sufficient acquittance? This, I confess, is besides the point in hand; yet because it concerns infants and executors (though not infant-executors) it is not amiss here to cast some thoughts and words upon the point, for that it many times perplexeth both executors and legatees. First, therefore, in case the infant be of the years of discretion, *viz.* 14, I hold it clear, that any payment to him made will stand good, for that the law at that age holds him able to govern and manage his own lands held in socage, and consequently to receive the rents thereof: wherefore, whether he who makes such payment have any acquittance or not, if he have proof of the payment, he is well enough acquitted from any second payment; and if without payment he get an acquittance, it will not suffice, the infancy of him who makes the acquittance considered. Besides, if the acquittance be, as most usually they are, but signed only with the name of the maker, and not sealed, it is only an evidence or proof of payment, and no pleadable acquittance, because no deed; so as it nothing differs from proof by witnesses, save that it is not mortal, as they. But now if the infant be under the years of discretion, what shall we say to a payment to him, especially if he be but 3 or 4 years old, or thereabout? Here I think caution is to be used by the executor generally; and the surest way is, if he fear to keep it in any respects, to pay it into the court where it is recoverable, *viz.* where the *will* was proved: yet the case so may be, as that this payment may not be at all safe for the

2

executor,

Notes of receipts, called acquittances.

Vide Stat 4, 5.
Annæ cap. 16.

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executor. As put the case that he entred into bond or statute, to pay all legacies by such a day to the severall legatees; here, I think, the payment into the court spiritual sufficeth not, for that must make the receipt to be with some charge, which is in some kind an abatement, there I think therefore, legally to secure the executor, the payment must be to or in the presence of the guardian, because of nutriture, *viz.* him or her who hath (though not as guardian in respect of lands) the custody or education of the infant; for otherwise, to pay it into the hands of such a tender infant, separate from any governor or guardian, were to expose it to loss, both for that he is not able to count the sum, and for that he, yet not being come to discerning years were alike with *Æsop's* Cock, to part with pearls or coin for plums and trifles of no value. But in case no bond nor other collateral penalty lie upon the executor, or in case the bond or statute be only to perform the *will* generally, which nothing alters the course of payment which by the *will* the law lays upon executors; then is not the executor put to any such payment, nor need pay without demand and acquittance, as in case of payment upon a single bill, or of rentseck, where no distress can be taken, nor other penalty incurred. Yet in that case, if demand be, and acquittance ready to be given, let the executor take heed, in case he be bound to performance, that he stand not upon the invalidity of the acquittance in respect of non-age; for, as I have said, proof by witnesses may supply a nullity of acquittance, and much more the weakness or imbecility; payment according to the testator's appointment being

being the matter which acquitteth the payer, and this the executor may have testified under the hands of divers witnesses expressing circumstances, so as all dying he may continue safe from second payment as well as if an acquittance had, the witnesses whereunto are subject to mortality as well as the other. But herein courts of equity do often interpose helpfully for them who seek not evasion from payment, but only security in paying. And of infant-executors, and by occasion thereof, of infancy in legators or legatees, thus much.

An infant-executor cannot sue *per Attornatum*, because he cannot make a warrant of attorney. But if one executor be of full age, he may sue with that other *per Attornatum*. 1 Lev. 299.

C H A P. XIX.

Of legacies.

ALthough these be not recoverable at and by the common law, but most naturally at and by the law ecclesiastical; yet by suits in courts of equity, as the *Chancery* and *Courts of Requests*, they are often obtained, and of many things touching them common law taketh notice, and hath manifold occasions so to do. We will therefore consider thereabout these parts or points, some whereof have been in part before touched upon other occasions.

I. Whether any legacy in certain, lying in preponder, may be taken or had, without the executor's

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ecutor's assent by the legatee, or him to whom it is bequeathed.

2. When an executor can or safely may pay, deliver or assent to a legacy.

3. Whether one executor alone may do it; and what if the executor be an infant, or woman-covert.

4. What shall amount to an assent of the executor, and what to disassent or disablement of assent.

5. How a lease or chattel real may be given to one for a time, with remainder to another; how not.

6. Where an assent to the first, or one part of the bequest, shall imply or amount to an assent for the residue.

7. Of the manner of assents, and therein of assents conditional.

8. What manner of interest he in the remainder of a lease after the death of another hath during the life of that other: and whether he may dispose of it during that time, and how.

9. Whether this remainder can be defeated by any act of the devisee for life, or by the death of him in remainder first.

10. By what acts or accidents a legacy may be forfeited or lost, and therein of revocation, death before, &c.

11. Whether the executor's assent shall have relation to the testator's death, and shall make good a grant before made by the legatee.

If the executor give it to another, the legatee hath no remedy at the common law, per *trifot.* 37 H. 6. 30.

As for the first, we have before shewed the assent of the executor to be necessary before any legacy can be had, for that debts are first to be paid, and that the executor is to look to, at his peril. But hereto add a little out of M. *Swinborn,*

born,

borne, a learned civilian, who saith, that in case any goods be in the hands or custody of *J. S.* and the owner doth bequeath them to him, then may he keep or retain them against the *will* of the executor, so as there be other sufficient goods in the hands of the executor for payment of all debts: but though thus (as it seems) it would stand in the ecclesiastical law, yet for that no property is transferred to the legatee without the executor's assent, therefore, doubtless, the executor may at the common law recover the thing with-held, or damages to the value, against the legatee detaining it. Another case there is, wherein, as the learned civilian saith, the legatee may take to him the thing bequeathed lying in prender, *viz.* Horse, other beast, or piece of plate, or other like thing known, and in being and that is, where the testator doth expressly so appoint by his *will*. But herein, doubtless, the common law, at and by which debts are recoverable against executors, will oppose the law spiritual: for else by such appointment the testator might cause all his goods to be taken by legatees, and that none should remain to pay debts. Yet if there be other goods besides sufficient for payment of debts; then indeed I see not how the executor can hinder such taking, without violating his oath taken for performance of the *will*. If any say, that it is also a breach of oath in the other case; I say, he observeth not that [there] that clause in the *will*, being against the law, is void, and consequently, there is a nullity upon it, and it is as if no such thing were in the *will*, and so the oath extendss not to it. And as a chattle shall not be transferred to a stranger with-

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out the executor's assent; so if the devise be to the executor himself till he elect to take as legatee, it shall be to him as executor, as appears by the strain and argument of two cases in *Plowd. Comment.* And more lately in the *King's Bench*, the point being divers days argued, was at last so resolved by three judges against one. And the reason of *Coke* at the bar was very good, for here the executor sustains two persons, viz. an executor and legatee, and so all one as where the bequest is to another; for, *Quando duo jura concurrunt in una persona, æquum est ut si essent in diversis.*

As for the second point, it may have these two parts: first, when the executor is able to give such assent to a legacy: And, secondly, when he may do it with safety. As for the first, he is able before probate of the *will* to assent unto the execution of a legacy, as elsewhere is shewed, and that although he be not of full age of one and twenty years: but if he be under seventeen years, so as he is not able to take upon him the office of an executor, and therefore administration is during that time to be committed to some other; here his assent is not of force or effectual, as we find in *Prince's case*, to have been held in the case of *Pigot and Gascoin.* As for the second part, till all debts be payed, the executor may not safely consent to put the legatee into the lease or chattel devised; no more than he may pay money bequeathed, if there be not sufficient also to pay all debts. Of these things more is said elsewhere. Yet because the reader, or he that desires direction in these points, will look for them under this title,

Welchden & El-
kington Para-
mour & Yardly,
Portman &
Simmes case,
Trin. 37 El.
All but Gaudy
so agreed.

21 El. Dyer
367.

Co. l. 3 f. 29.

tle, I thought not good here to be altogether silent touching them.

As to the third point, *viz.* Whether the assent of one executor, where there be many, be sufficient; I see not how to doubt: since any one executor may give away any goods of the testator's, or release any debts due to him, therefore much more assent; which is no more or greater work, in effect, than an attornment of one lessee upon a grant of a reversion. And if there want to pay debts, he only who assented shall answer for it of his own goods and not his companions. But if this executor be either under the age of seventeen years, or under coverture, *viz.* a woman married, such is not able to give a good assent to bind the others, no nor themselves, for then thereby the infant might draw a debt upon himself, and the wife upon her husband, by assenting to or paying of a legacy, there not being sufficient goods to pay all debts. But the husband's assent is sufficient where the wife is executrix; for his act, whom she hath chosen to be her head, may prejudice as well her as himself; yea, though she were within age, yet he being of full age, his assent will stand good. But if he or another executor in his own right be above seventeen years of age, or else under twenty-one, I doubt whether now his assent will be sufficient at least, except the case be put, that there be *Assets* sufficient, which perhaps there may be material, though not in the other. See more hereof after in the title of women-covert and infants executors.

As to the fourth point: first, there may be an assent and election implied as well as express:

Q

for

6 H. 7. 5. If the bequest be to one of the executors, he may take it without assent of his companions; yet if a debt; his companion may release. H. 48 E. 4. 14, 15. So held where but one of the executors during non-age assented in the case of Rhetorick and Chappel. H. 9 Jacob. Rot 87. in Ban. Reg.

In the special
verdict in Man-
ning's case, the
first devisee, Ea-
dem Maria dixit,
quod si ipsa obi-
ret tunc, præd.
Matheas, (viz.
the remainder
man and admini-
strator after her
death, de bonis
non, for she was
executrix) habe-
ret firmam &
molendin. præd.
Vide 8 Co.

94. Manning's
case.

See Co. Lib.

Intr. 150. the
executor being
devisee for life,
said the other
should have it af-
ter her death;
and he entered,
and took admini-
stration, she
dying intestate,
yet held Assets
in him. This
M. 19 H. 7.

Rot. 318. See

Lib. Inter. 321.

One gave the
third part of his
goods to A. with
whom the exe-
cutor accounted
for the amount,
and A. sued for
that sum in
debt; but no
judgment upon
demurrer. Tr.
37 El. in B. R.
Where bequests
to the executor
himself.

Tr. 37 Eliz.

If he by *will* be-
queath it to J. S.
this is an election
to have it as le-
gatee.

for if in the devise or bequest the legatee be ap-
pointed to do some act as in respect of the le-
gacy and the executor doth accept the perfor-
mance thereof, this amounteth to an assent. So
if the devise be to an executor for the educa-
tion of some children, which he doth accordingly
educate, this makes an election to have the
thing by way of legacy, and not as executor,
as appears by the case of *Paramour* and *Yardley*,
Plowd. 543. So if an horse be bequeathed, and
one offering to buy him of the executor him-
self, he directeth him to go and buy the horse
of the legatee, or if the executor himself offer
money to the legatee for the horse; this impli-
eth an assent that it should be the legatee's by
the *will*: and so was it held in the case between
Low and *Carter*, where the devisee of a term
did grant it to the executor; and this accep-
tance of a grant from him was held to imply
the executor's assent, that it should be his to
grant. But I see not well how that should be
law which in the later part of the *L. Dyer* is
found, viz. Where a term was devised to *J. S.*
and he was made executor, and after the death
of the testator entered and occupied the lands a
whole year without proving the *will*, that this
was an election to have it as devisee, and not
as executor. For, first, he had good right to
the term as executor before probate, and so
might clearly in that right have taken the pro-
fits, although it had not been devised or be-
queathed to him, and that before any *will* prov-
ed. Secondly, He could not by right have it
as legatee, without assent of himself or some
other as executor. Therefore this general ac-
ception can determine no election. as else-

where is held: As for dis-assent or disabiment to assent: as if the executor do once declare his assent that the legatee shall have his legacy, he may then enter into it or take it, notwithstanding the executor's countermand or revocation of his assent after; so, on the other side, I think, if he fully and expressly deny that the legacy shall take effect, he cannot after make a good assent thereunto, for that election once made must stand peremptory, be it refusal to assent, or assent. Yet *Quere* of this, for that the refusal to assent may be checked by sentence or decree in the spiritual court or court of equity, and so an assent be enforced. But if the power of assenting be legally lost by the means aforesaid, *viz.* disabled, I see not how any legal interest can be transferred by that compelled assent, howsoever decreed. And what is said of a legacy bequeathed to another, the same may be understood in case where the bequest is to the executor himself, and he makes his election to have it as legatee, or as executor. But if where an horse is bequeathed to *A.* the executor after the testator's death doth ride the horse, or use him in the coach or in the plough, I do not take this to be any such disagreement to the execution of the legacy, as that the executor cannot after assent to the legatee's having thereof, no more (though it be somewhat more) than where a drinking-cup is bequeathed, and the executor after the testator's death doth use it to drink in: nay, if a lease of land be bequeathed to *A.* and the executor continueth the depasturing of the testator's cattle therein; yet is not this any disagreement to the execution of the legacy. But if this lease-land were let out by

So if the executor take a new lease, his assent after is void. Tr. 37 Elz. Carter's case, 19 El. Dy. 359.

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the testator from year to year, and the executor dischargeth the tenant, and taketh it into his hands at the year's end; this I conceive to be a dis-assent to the legacy: and so also perhaps may his taking or distraining for any rent thereupon due after the testator's death. Yet am I not resolute that the dis-assent is so peremptory and unchangeable as the assent, remembring the case in *K. Henry* the eighth his time, where a term being granted by a lessee conditionally, so as the assent of the lessor could be had by such a day; though the lessor's assent were at one time denied, yet might it be yielded at another, so as it were at any time before the day. But yet there it was held, that if no time of assent were limited, then one express denial or refusal would be peremptory, so as the refusal were expressed to the party to whom the assent was to be given, otherwise, if it were but in speech to or amongst strangers. This and the former case, 19 *Eliz.* give the best light to this point that I remember. Now for disablement to assent, it was held in the forementioned case of *Low* and *Carter*, that where a term is bequeathed to *A.* and after the testator's death the executor takes a new lease of the same land for more years in possession, or to begin presently; now by this was the term left by the testator surrendered and drowned, so as it could not pass to *A.* by the executor's assent after.

As to the fifth point, *viz.* in what manner a lease for years or other chattel real may be bequeathed to one for a time, with remainder to another; it hath been heretofore much doubted, when a lease for years was bequeathed to one for life, or for so many years as he should live,

14 H. 8. 23.

Dy. 559. After
choice once
made, no va-
riation.

live, whether the limiting of a remainder thereof after his decease were of any validity in law or not. And this doubt had this ground: any estate for life in the judgment of law is greater than any term for years: therefore when a termor hath by his will given his term, or his house or land which he so holdeth for years to one for life, or for so many years as he shall live; this testator and devisor hath not in the judgment of the law any estate remaining in him: and therefore it was thought very hard for him to give or limit a remainder to another. But after many arguings and debatings, it was in the late Queen's time resolved, that such a remainder was good; and that if the first devisee died before the term expired, that then he to whom the remainder was limited might enter and enjoy the residue of the term. As for the giving of part of the years to one, and the residue to the other; viz. if the term being twenty years, the lessee bequeathed ten thereof to his wife, and the remainder to his daughter; of this no doubt ever was but that it was good: for that after the first state limited, there remained a farther term, viz. ten years more in the devisor, whereof he had power to dispose; whereas in the other case, after the term limited to one for life, there remained but a possibility that this life should not take up the whole Term. But now, put we the case a third way, viz. that the termor deviseth or bequeatheth the thing in lease to one child in tail, with remainder to another, and dieth, and the first entereth and dieth without issue; now whether shall the next in remainder, or the executor of him so dying have the term residue? And this case came in question, and

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Both Alexander and Ralph were executors ; but that makes no difference.

was adjudged about the middle of King *James* his reign in the *Exchequer* : for there, Master *Hamond* holding by lease for years from the crown the manor of *Akers* in *Kent*, devised the same by his *will* to *Alexander Hamond*, his eldest son, and the heirs males of his body, with remainder to *Ralph Hamond*, another son, in like manner, and the like remainder to *Thomas Hamond*, and made the said *Alexander* executor, who after his father's decease elected to take as legatee, and after *Ralph Hamond* died, leaving issue male, and making his wife executrix : *Alexander*, not having issue male granted the whole term by deed to *B.* and *C.* for the behoof of himself and his wife during their lives, and after to the use of his youngest daughter, whom Sir *Robert Lewkener* married. Then *Alexander* dying without issue male, the wife and executrix of *Ralph Hamond* entred, claiming the term, and being kept out, sealed a lease ; whereupon an *Eject. firmæ* was brought, and the jury appearing at the bar in the *Exchequer* found a special verdict in effect *ut supra*. And in argument of this case, first the main question was, whether the case were all one in law with the former, where a term was devised to one for life, with remainder over, so as by the death of *Alexander Hamond* without issue male the term should go to the next in remainder, as in the other case, by the death of the devisee for life, dying within the term, it should do ? And on the plaintiff's part it was urged to be all one, so that by virtue of the bequests *supra*, *Alexander* had an estate to him and his executors only so long as there should be heirs-males of his body ; and he dying without such issue, the term remained to the
 executors

Executors of *Ralph*, who had the remainder in like manner, and left issue male, which still lived, and so that state of *Ralph* yet had continuance. For it was admitted by the counsel on that side, that the term could not go to the issue male of *Ralph* according to the words and intent of the will, since it was impossible to make a term to descend without an act of parliament. This therefore they said the law should work, which was nearest to the intent, viz. that after *Alexander's* death it should go first to his executors and assigns, so long as issue male of his body doth continue; and for want of such issue, then to *Ralph*, his executors and assigns, so long as his issue male should last: and therefore in this case, the issue male of *Alexander* failing, the executor of *Ralph*, whose issue male faileth not, should enjoy the term; and so judgment ought to be given for the plaintiff being lessee of that executor. On the other side it was said by the defendant's council, that this case differeth much from the other case, where the term or land held by lease is given but for life to the first, with remainder to another; which case, as having been often resolved, was clearly admitted to be good law: for in that case the intent of the testator might and did take effect. But in this case if the land should go to the executors and assigns of *Ralph Hamond*, it must go against the intent of the testator, whose mind and will was, as it appears by his words, that it should go only to the issue male of one son after another and not to any executors. Now then, since this intent was so contrary to the rules of law, that it could not take effect, therefore it must be void, and so all the words of heirs male stand-

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Holford vel Hol-
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29 El. argued,
and Tr. 29 El.
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smore v. Hub-
bard, Pas. 29 El.
Cro. El. p. 57.

ing void, the will is to be construed as a sole and absolute gift and bequest to the said *Alex.* and consequently the term must go to his executors and assigns. And for this point, resemblance was made to a case resolved in the *King's Bench*; where a lease was made by indenture to *A. Habend.* to *A. B.* and *C.* for their lives: now because *B.* and *C.* could take nothing, it was resolved that *A.* should not have it for their lives, but for his own only. This case was said to come very close in reason to the case in question: for as here the intent of the lease was that *B.* and *C.* should be estated for their lives, and, since that could not be, therefore the naming of them should be utterly void, and as if they had not at all been named, and their lives shall not stand as a measure for the estate of *A.* so in the other case the intent of the *will* being, that the lease or land leased should go to the heirs-males of the body, first of *Alexander*, and after of *Ralph*, since this cannot be, therefore the words and name of heirs males should stand for a mere blank and cypher, and not to measure out any state to the said *Alexander* and *Ralph*, and their executors and assigns. Also it was said on the defendant's part, that an estate for life in the judgment of law is of so short and uncertain continuance, that if *A.* make a lease to *B.* for his life, and after makes a lease of the same land to *C.* for years, now shall not this later lease be void absolutely for any part of the term, but shall stand in expectation of the death of *B.* and, as soon as he dieth, shall take effect immediately: whereas if the lease to *B.* had been for ten years, or any like term, then the lease to *C.* should have been void for
so

so many years of his term. Thus it appears that a state for life is very momentary in the judgment of law, and not reputed of any certain continuance so much as for a day. But it is otherwise of an estate-tail, so that if *A.* having given land to *B.* in tail, doth after (without indenture which makes an estoppel) make a lease to *C.* for 21 years, and then *B.* dieth without issue during the term, yet shall not the lease take effect, because it was utterly void at the first making. For an estate-tail, being a state of inheritance, may in the intendment and judgment of law have continuance for ever, as appears both by the case of *Adams* and *Lambert*, where it is held within the statute of chanteries, which speaks of gifts to have continuance for ever. Therefore a reversion upon an estate-tail is no *Assets*, nor giveth cause of receipt; otherwise in all these cases it is touching a reversion expectant upon a state for life. Again, it was said by the defendant's council, that an estate may be limited to *A.* and his heirs during the life of *B.* with remainder to *C.* as in *Chudley's* case was resolved: but if land be given to *A.* and his heirs so long as *B.* shall have heirs of his body or heirs-males, with remainder over to *C.* this remainder is utterly void. So as there is in the judgment of law a great difference between the largeness and continuance of an estate-tail, and of an estate for life. And if (which is worth the observing) a fee-simple cannot afford a remainder to be drawn out of it after such a gift to one and his heirs, during the continuance of an estate tail, or of the measure thereof; much less can a term yield such large thongs to be cut out of it, as a remainder after an estate

28 H. Dy. f. 7. estate to one so long as he shall have heirs of his body, or heirs-males, which is all one. And in this case the remainder was held void by *Baldwin* and *Shelly*, though *Englefield* were of a contrary opinion, as the Lord *Dyer* sheweth. Farther it was said, that if such a conveyance by *will* should stand good, it would raise a perpetuity not to be cut off by any recovery.

But whereas the case of *Hamond* hath been related before, so as by way of admittance it was argued as a gift and bequest to *Alexander Hamond* and the heirs-male of his body, with remainder in like manner to *Ralph*; the truth of the case was, that the words of the *will* were only to *Alexander* and his heirs-males, (not speaking of his body) and so to *Ralph*; which, as was urged by the defendant's council, made the case stronger against the plaintiffs; for admit that the former way *Alexander* should have had but a state determinable upon the continuance of his issue-males, yet here not so; since the reason why in *wills*, such a devise being made, the law should supply the words (*of his body*) is only to make an estate-tail to the issues-male, according to the testator's intent. Now in this case of a term for years so bequeathed, no estate-tail could possibly be, though these words had been in the *will*; and therefore the motive to the law failing, no such supply will be made by the law, since it would be to no purpose: consequently, here was neither state-tail, nor issues or heir-males of the body, on whose continuance this state of *Alexander* should be determinable. Therefore it was an absolute and total bequest of the term to *Alexander* for ever, *viz.* so long as the term should continue; for as a bequest

bequest to one for ever is as much as a bequest to him and his heirs; so a bequest to one and his heirs is as much as if it had been to him for ever.

And this case, after six arguments on each side at the bar, (if I much mistake not) was upon argument by the barons adjudged for the defendant by the Lord Chief Baron *Tanfield* and Mr. Baron *Bromley*, Mr. Baron *Denham* (who only heard, as I take it, one argument on each side, made of purpose in respect of his coming into his place, after the former arguments) being of the contrary opinion: and the judgment proceeded upon the point formerly touched, that, as this case was, the state of *Alexander* did not end by his death, and remain to the executors of *Ralph*. Other points were stirred, which will be touched upon in other divisions after, in this chapter. It will be observed that I do more fully express reasons and points enforced on the defendants part than on the plaintiffs, wherefore let these two reasons be accepted. First, that I better could relate *that* than the other, being the first who argued for the defendant, and hearing little of that which was by others said on either side after, nor hearing the courts; *nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lie on the defendant's part, to prove that this case differeth from the common case of devise to one for life, with remainder to another.

We are now come to the sixth point, *viz.* that where house or land held by lease, or the profits thereof, or the lease or term itself, which in a *will* makes no difference, is bequeathed to *A.* for life, or for some part of the term, with

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Piow. 545. 6.
Co. Lib. 10. f. 47.

remainder to *B.* and the executor assents that *A.* shall enjoy his bequest whether this shall enure to *B.* also, since without the executors assent no legacy can take effect. And it hath been resolved that this assent shall be effectual as well to all the remainders as to the first estate: and so, according to former resolutions, it was admitted in *Hamond's* case, that *Alexander* his assent to take as legatee sufficed (if the bequest had been good) for the remainder to *Ralph* and others. And the reason of this doubtless is, because here the particular estate and the remainder are all but one estate in law; they make but one degree in a writ of entry, nor shall have but one year and a day to enter for mortmain. And an attornment to the grantee of a rent or reversion for life with remainder over doth enure also to the remainder, which being assent hath much affinity to that of the executor, each tending to perfect the grant of another man. Now then, whereas it was urged in *Hamond's* case, that the state limited to *Ralph* should take effect, not as a remainder, but as a new estate to commence futurely, *viz.* when *Alex.* should be dead without issue male: if it could be admitted to be so, then could not the assent of the first state to *Alexander* have enured to this, since to *R.* in remainder it worketh as being one state with the first, which reason must fail the other way. This difference, between a remainder, and a new estate future, brings to my mind the case of a rent by way of new creation, granted by *C.* out of land to *A.* for life, or in tail, with remainder to *B.* In like manner it hath probably been held, although this limitation to *B.* cannot be good by way of remainder, because *C.* had no estate

estate in the rent remaining with him when he made the grant to *A.* yet should it be good by way of a new grant and creation to commence futurely. But this doubtless cannot so be but with a difference. For if the grant were by indenture between *C.* on the one part, and *A.* only on the other part, now *B.* being no party to the deed, can take nothing by it, except by way of remainder, but if he were party to the indenture; or if the grant were by deed-poll, to which all men are alike parties, then it haply may enure as a future grant to *B.* This is not impertinent.

Now as the executor's assent to one cannot enure to another, though of the same thing, except by way of remainder; so neither can it any way where the things are not the same, except in very special cases. As if a termor bequeath a rent to *A.* and the land itself to *B.* the executor's assent that *A.* should have the rent is no assent that *B.* should have the land: Yet I think the executor's assent that *B.* should have the land doth imply the assent that *A.* should have the rent. 1. For that the restraint imposed by the law against the passing of a chattel by a *will* without the executor's assent being out of respect to the payment of the testator's debts, now if the land should pass to *B.* it is no more available to the testator's debts that it pass discharged of the rent, than charged. 2. Since the gift and bequest was of the land charged with the rent, therefore if this bequest shall take effect, it shall carry the lands according to the testator's intent, *viz.* with this charge upon it: for what else doth the executor in this, but assent that the *will* of the testator herein doth stand

Plow. Con. 521.
in Bret & Rigden's case. So
of common or
other profit.

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stand and take effect? and consequently *B.* must take the term according to the *will*, and not in any different or contrary manner.

Next we are to consider of the manner of assents by executors, which hath some affinity with the fourth point. But here we shall consider only of assents conditional. Now to this purpose we will cast our eyes upon two sorts of conditions, *viz.* precedent, and subsequent. As for the former, an executor may to a legatee absolutely give assent upon a condition precedent, as thus: I am content, that if you can get and bring in to me such a bond wherein the testator stood bound to *J. S.* that then you enter upon the term, or take the corn or cattle to you bequeathed. So of other like conditions which may precede the assent: as, if you can get the assent of my executor, or, if you will pay the arrearages of rent to the lessor behind at the testator's death, or, if you will pay the wages already due to the servants attending about the cattle or corn to you bequeathed; in this case if the condition be not performed, there is no assent, and therefore the conditioning in this manner is good. But if it be on a condition subsequent, as thus, I do agree that you shall have the thing bequeathed to you, provided that you shall pay so much yearly to me, or to such a creditor of the testator; now the legatee entering into or taking the thing bequeathed, shall not lose it again by failing to perform the condition afterwards; for the executor by his assent cannot make that legacy conditional which the testator gave absolutely, no more than he can make the bequest to be absolute which the testator gave conditionally, except by

a release made of the condition. As in other things, so in this, the executor's assent is like to the attornment of a lessee, which cannot be upon a condition subsequent, where the grant is absolute or without condition, though yet he may to his attornment prefix a condition precedent.

In the eighth place we are, touching the bequest of leases or chattels real, to consider what manner of interest one to whom a remainder of a term after the death of another is limited hath, and whether he may grant the same or dispose thereof during the life of the first. And as to that it is clear that he hath but a possibility of remainder, for that possibly the whole term may be spent in the life of the first, to whom during his or her life it is bequeathed: now a mere possibility is not grantable. There

9 Eliz. Fulsey's case.

Lampet's case
Co. l. 10. f. 48.

fore was it resolved in the late Queen's time, where he in remainder granted or sold his state or interest to another during the time of the first, that this grant was utterly void, because a possibility cannot be granted. But whereas some opinion in that case was delivered, that this possibility could not be released, no more than granted; it hath since been resolved, that he in the remainder, by his deed of grant or release of the devisee for life, may make his estate, which before was determinable by his death, to be now absolute, so as it shall continue to his executors, administrators and assigns, after his death during the whole term. It may be that what was conceived, in the said case of *Fulsey*, negatively of the validity of a release by him in the remainder, might be meant, or perhaps expressed of a release to him in the rever-

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sion: but surely (methinks) though he could not surrender, yet his release or defeasance to him in reversion or remainder, having the freehold or inheritance, should dissolve or destroy this term residue after the death of the devisee for life, so as there the freehold should be discharged thereof. But *Quære*, for I have not known this in question. As for the other point of *Fulsey's* case, it was in the said later case of *Lampet* confirmed and admitted for good law, *viz.* that this possibility of remainder could not be aliened nor conveyed to a stranger.

Now we are come to the ninth point, *viz.* to examine whether any act of the devisee for life can frustrate or defeat him in the remainder of the term, and whether the act of God, *viz.* by the death of him in the remainder before the first devisee for life, shall defeat it. As to the first, it hath divers times been resolved, that no grant made by the first man can cut off or defeat the second, though formerly it were held otherwise: but according to the late resolution was it also held or admitted by all, in the said case of *Hamond*, where was such a grant. And as this cannot be done by any direct grant or alienation, no more can it by an indirect or implied, as by taking of a new lease, which is a surrender in law of the old lease, no more than by an express surrender; nor doubtless by outlawry, whereby the term of the first devisee is settled in the crown. But if we put the case farther, of waste committed by the tenant for life, or breach of condition by not payment of the rent, or otherwise; these for the whole in the later case, and for the part wasted in the former, do so destroy the lease, and put the reversion

Plow. 322.
Welchden &
Elkington.
10 Eliz. Dy. 277.
12 El. D. 359.
Co. 8. El. D.
253. & 33 H. 8.
Br. Chattels 23.

in statu quo prius, as that all remainders must needs fail : so of a feoffment, or other like forfeiture by fine. As for the death of him in remainder, it was urged in the case of *Hamond*, that since it was but a mere possibility, if it could not take effect, and become an estate in the life of him to whom it was limited, it could not settle in his executor : and to that purpose were cited the case of the rector of *Chedington*, and more expressly, as resolved in the point, the case of *Price* and *Atmore*. But the court resolved, (and found former resolutions in other courts that way) that the death of him in remainder did not hinder, but that it may settle as well in the executors upon the death of the devisee, as it should have done in himself, if he had over-lived the first devisee for life. If the lessor enter and levy a fine, and the devisee for life enter not, nor claims in five years ; he in the remainder may enter, as having a right futurely accrued.

Lib. 7. 153.
Welken & Elk.
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In the last place we intermeddled only with leases bequeathed, wherein yet is to be understood, that what thereof is spoken is to be extended to and understood of all other chattels real, as wardship of body and lands, estates by extent upon statutes or judgments, terms, otherwise than by lease, in fairs, markets, rents, annuities, commons, advowsons, and other profits ; yea, one single next avoidance of a church. Now we come to consider of bequests personal principally, if not only ; *viz.* how such may be forfeited, lost, or revoked. First then, we will consider of the acts of the legatee ; secondly, of the acts of God ; thirdly, of the acts of the testator. The legatee, as from the civilians I

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learn, may forfeit his legacy by his miscarriage towards the *will*: as if he uses means to have it concealed and kept from being known, and consequently proved. So if he accuse it of falsity. So, again, if he deface or destroy the *will*. Also, if being by the *will* appointed to be tutor or educator of a child, he refuseth so to be. So saith master *Swinburne*: but *Sylvester Prierius* seems to me opposite in that, where he saith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non est conditionale, sed modale*; so as he takes away the force of a condition from words conditional, whereas the other without words conditional raiseth a condition implied. Lastly, if the legatee presume too far upon the strength of the bequest to him, so as he taketh the thing bequeathed without the consent of the executor, thus also doth he forfeit his legacy, saith Master *Swinburne*, unless the testator did *will* and appoint he should so do. The falling into enmity with the testator will be considered more fitly, as I take it, among the acts of the testator. In the next place, let us see what acts of God shall cause a legacy not to take effect. First thus, if the legatee die before the testator, this legacy is lost, and his executor shall not have it. So also, saith Master *Swinburne*, if it be appointed to be paid after the death of the executor, and the legatee dieth before the executor, 'tis lost. And so also if he die before the condition performed, saith he. Let us come now to time of payment, and death

Vide p. Sup. 19. Swinb. de testam. 352, 353. except as tutor or guardian he refuse. Sum. Sylv. 283. De Testm. 252. De Testm. 255. Vide Bro. De- vite 27 and 45. The e were di- ve s days of pay ment, and the devisee die before the last; his executor shall have it, 14 vel. 21 H. 8. 36 . 3. & 3 El D. 59. See this difference. Sum. Sylv. 283. According hereto vide Dy. ubi supra per majorem opinionem justiciar. The executor shan't have it till B. would have been 25. 2 Vern. 109. Trin 1728. Laundry and Willie, but if payable with interest, qu.

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before it. If there be a day certain limited for payment, and the legatee die before that day, his executor shall have the legacy; contrariwise, if the payment were limited to be made when the legatee should be married: but if it were only expressed to be towards the marriage of the legatee, and she die before marriage, her executor shall have it, saith *Swinburne*. Now put the case that a legacy is bequeathed to *B.* to be paid when he shall be five and twenty years old, and *B.* dieth before that age; it shall now be paid to the executor, and that presently, without staying till *B.* should have been of that age, saith *Prierius*. Nay, saith *Swinburne*, if the words of the *will* be so, *viz.* when he shall come to such an age, then if he die before, his executors shall not have it at all: but if the bequest be general, and farther it be added in the *will*, that the testator would have that legacy paid to the legatee at such an age, there though he die before such an age, yet his executors shall have the sum bequeathed. The difference may be seen very nice, yet haply it wants not some probable colour of reason. Now lastly, let us come to the testator's own acts, who clearly hath power to revoke or countermand any legacy, though he revoke not the rest of the *will*. And here first of revocation presumed. If there fall out *graves inimicitias inter Legantem & Legatarium, Legatum caducum efficitur*, saith the summist; *sed non propter leves*, saith he, *& si graves, si tamen redeant ad amicitiam, redintegratur Legatum*. That is, by grievous enmity after arising, and never reconciled between the testator and legatee, the legacy is dissolved; otherwise of a light breach or

Stapleton v. Cheals. Rep. of Cases in Eq. 76. by C. Baron Gilbert, Hil. 8. Ann. in Canc.

Acts of the testator.

Sum. Sylv. 285.

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falling out, though it continue until the death of the testator. This I conceive to be rather fit for this place, as an act of the testator, than to be reckoned or registred amongst the acts or forfeitures of the legatee; for that it is not by the summist made material, or any point of difference, whether the legatee gave just cause of offence, or that the testator unjustly conceived displeasure, and so grew into causeless enmity. Therefore also do I hold it of the nature of a revocation implied or presumed; for that although no revocation be made, yet since the testator hath ceased to bear good will to the legatee, he cannot be intended to will him good, nor consequently to be of the same mind touching the benefiting of him, as he was when he made his will. Yet here again it is worth the consideration, whether the circumstance following may not make a difference in the case, thus; that where the testator dieth shortly after the breach and enmity grown, and before he come to the place where his *will* is, or at least to opportunity of perusing and reforming the same, there this very alteration of affection should make an alteration in the *will*, and a revocation of the amicable bequest. But where he living a good space after, and coming to the place where his *will* was, and specially if he do again peruse it, he yet doth not cross nor expunge that bequest, here it may be presumed that either his enmity ceased, or that so far, as to continue this bequest, the charity or other motives inducing him to make it stand unvanishd and not extinguished by this breach of former amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative *will*,

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without reducing it to writing, and causing it to be attested by witnesses, though the testator live divers years after, doth stronger argue his intent not to continue, that what was done in an extremity should stand as his *will*: so, on the contrary, the permitting of a bequest expressed in a written *will* to continue without any crossing, blotting or defacing, may argue, against contrary presumption, the testator's mind, that it should continue as part of his *will*. But now let us consider of more expresse revocation, and to that purpose will relate a late decree in the *Chancery*, made by the lord keeper, according to the opinion of the master of the rolls, three judges, and two doctors, masters of the court, between *Robert Eyre* and *William Eyre* complainants, and *Hester*, late wife of *Christopher Eyre* their brother, and now wife of *Sir Francis Wortley* defendant: thus was the case. The said *Christopher Eyre*, 15 *Jacobi*, by his last *will* and testament giveth and bequeatheth to the said *Robert Eyre* his brother an hundred pounds, and to the said *William* his brother a thousand pounds, and gives to the said *Hester* his wife all the residue of his estate, and makes and ordains the said *Hester* his sole and only executrix, saving, for the performance of his *will*, he orders *Robert Eyre* and *William Eyre*, his said brothers, and intreats them to join as executors in trust with his wife, for the better performance of this his last *will*. Afterwards, *Jan. 5. 1624.* being sick of the sickness, whereof he died, he was moved by Master *Dampport* and Master *Stone* to settle his estate: to which motion he yielded: and Master *Stone* and Master *Dampport* did demand of the said *Christopher* what friend he

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thought fittest to be his executor, and to whom he would commit the care of discharging his funeral, and performing his *will*, whether he trusted any person more than is wife to be his executor. To whom he answered, that his wife was the fittest person for that purpose, and therefore should be his sole executrix. And then the testator was moved by Master *Stone* to give and bequeath legacies to his father, to his brethren, and to his kindred: whereupon he answered, he would give or leave them nothing. And being farther put in mind to remember his friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty shillings. And being thereupon moved by his wife to give his said God-son more, or a greater legacy, or the like in effect, he said, thou knowest not what thou doest, do not wrong thy self; twenty shillings or thirty shillings is money in a poor bodies purse, or the like in effect: and the rest he left to his wife's discretion or disposition. And the said testator did speak the words aforesaid, or the like in effect, *Animo testandi & ultimam Voluntatem declarandi*, as the witnesses then present did conceive.

This *will* was proved by the oath of the said *Hester*, and this codicil pleaded as a revocation of the said bequest, the said master of the rolls, judges and doctors, were by the lord keeper and the order of the court desired to reduce the matter upon the *will* and codicil into a case, and to certify their opinions, whether the said codicil were a revocation of the legacies given to the plaintiffs, or not. And they, after council heard at several times, *viz.* both common
lawyers

lawyers and civilians, and many hours spent in conference together, did finally resolve with one unanimous consent, that the legacies to the plaintiffs given, were not by the said codicil revoked, and so certified under their hands. Upon reading whereof *Novem. 25*, decree being resolved to be made, if cause were not shewn to the contrary *Novemb. 27*; on which day the defendant's council, before the lord keeper, in the presence of the master of the rolls and the said three judges, and Sir *John Heyward*, alledging what they could in stay of the said decree; it was by a general concurrence of opinion decreed, that the legacies given to the said plaintiffs should be to them paid on our *Lady*-even, with twenty nobles in the hundred for the detainment thereof.

This case, I thought fit to relate somewhat at large, because it pitched upon the point of revocation, without plain, full and express terms. And surely, as *wills* are to be made out of disposing memories and understandings, so also with deliberate and advised judgments; and therefore by like reason not to be countermanded or revoked by sick or slight expressions. And this seems to me very agreeable with the rule and reason of the common law. For as reason itself doth dictate, that *Nil tam consentaneum est æquitati naturali, quam unumquodque dissolvi eodem modo quo conficitur*; so hath the common law of *England*, in my understanding resolved: as for the purpose, if the king present a clerk to a church, and he is thereupon admitted, and instituted thereunto; now yet before induction may this be revoked as a *will* may: yet if the king shall after, and before induction, present another

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27 El. cap. 4.

man to this church, without an expresse repeal or countermand of the former presentation; it shall not thereby be revoked. So if lands were conveyed to certain uses, with a clause or power of revocation, the sale of the same to another did not revoke the former: but if a state were meerly at will, then the conveyance to another by the common law amounted to a revocation.

6 H. 8. cap. 9.

Therefore was the statute made *tempore Henrici 8.* to redress this, *viz* that where the King had granted lands or other things to one during his pleasure, this should not be revoked by a grant to another, without recital of the former, and declaration that the king had determined his pleasure.

Relation wh. t.

Being now to consider of relation in the executors assent, it is meet, since these discourses are principally intended for those who are not grounded students in, or professors of the law, that we shew what we mean by relation, or what it is in law. Thus therefore be it conceived, that relation is a kind of fiction in law, making a thing done at one time to be accepted and reputed, or to have its operation, as if it had been done at another time past. As for the purpose, *A.* doth bargain, and sell freehold land to *B.* in *August* by indenture, which is not inrolled till *October* following; yet this hath such relation to the date of the indenture, that if *A.* after that, and before the inrolment, become bound in a statute, or granted a rent charge, or made a lease for years, or took a wife, or committed felony, yet shall none of these be of any force to charge or prejudice the state of *B.* for that the law adjudgeth him now owner by relation as from the time of the date: yea if a
fer-

servant departed in *August* for some great breach with his master, do kill his master, in *October*, this is in law petty treason, as if he had continued servant when he did the fact; because it relates to the malice conceived when he was his servant. Now having shewed that a term or other chattel real or personal passeth not, nor is transferred in property to the devisee, until the assent of the executor be thereunto had; we now put the case that this assent is not had till a year or some such good space after the testator's death, and make our question, whether this shall have relation to the testator's death, *viz.* to be in the law's account as if it had then been; or, perhaps, to some purposes so to stand, and to others not so? That this is useful and material to be known, be it thus shewed. One bequeathed his term of tithes of an advowson of an house or land by him first leased to an under-tenant for rent, and dieth in *May*, the executor assenteth to the bequest in *October*, between which two times tithes be set out, the church becometh void, rent groweth payable; now if this assent shall relate to the testator's death, the devisee shall have these, else not. The like cases may be put of the brood of cows, mares and ewes, fallen between the death of the testator and the assent; so also of fleeces of sheep shorn, &c.

Now to come to the point, it is reported by the Lord *Coke* to have been held in the late Queen's time, that this assent shall, as between the executor and the legatee, have relation to the testator's death, yet so that if the executor before his assent to the devisee of the lease committed waste, now the action of waste shall be brought

Tr. 41 Eliz. Co.
l. 5. f. 12 B.
Sander's case
Vide Plow. com.
of trespass a-
gainst a stranger
for taking before
assent, 280. b.

The Office of an Executor.

brought against the executor in the *Tenuit* for the waste done before, and not against the devisee in the *Tenet*.

But put the case that the legatee before the executors assent granted the term to *J. S.* now if to any purpose this assent shall have relation, it shall certainly so be, to make good this grant, as making the legatee to be estated, and consequently able to grant before the executor's assent; yet do I not find any opinion or resolution in the point, but find it debated at the bar in the late Queen's time between *Puckering* and *Egerton*, in the case of administration granted to *A.* after her grant of a free term left by her intestate husband; but I find no resolution therein, nor perhaps wants there material difference betwixt that case and the other; for there the devisee had at least an inception of title by gift of the owner, wanting only a circumstance of assent to perfect it; but here this woman till administration, had not so, unless, perhaps, the statute 21 of King *Henry* the eighth, directing or enjoyning ordinaries to grant administration, shall amount to a kind of title *ad rem*, though not yet *in re*. But to return to the point of *Assets*; where a reversion is granted by deed or fine, if the lessee a good time after do attorn, this shall have no relation to the time of the grant; so as for waste committed or rent grown due between the grant and attornment, the grantee can have no remedy. Therefore it is good for him who buyeth, or hath any thing of the gift of a legatee, to have the assent of the executor before the sale or gift well testified; or if the assent be not had till after, let him take a new gift, that he may not rest in a doubtful case:

P. 25 Eliz.

case: for besides the premisses, that great legist Sir *Edward Coke*, when he was a practiser (to Mr. *Stubbs* of *Norfolk*) for his fee, gave his opinion, as I have been confidently informed, that where a lessee for years being outlawed did grant his term, and after reversed the outlawry, this did not make good the grant by relation, it not being in the grantor at the time of his grant. And this hath much affinity with the principal point; for there, if the relation help not, the grant is not good from the legatee.

Divers cases of bequests considered and expounded.

IF a termor of an house bequeath his house to *B.* without expressing how long he should have it, he shall have the whole term, and number of years. So of land.

14 El. Dy. 307.
Cont. in a grant
31 Eliz.

Also of the name of the house, the orchards, gardens and back-sides do pass: yea, if the house with the appertinances be bequeathed, thereby the land belonging to the house, or used with it, do pass, though yet they would not so do by such words, in any lease, deed or grant. Yet by some civilians or canonists, the orchard belonging to an house shall not pass by the only gift of the house, without some words shewing the intent of the testator so to be, or except one gate or door lead as well to the orchard as to the house: but some other of them hold, that it doth pass without any such help of circumstance, so as it be adjoining to the house.

Gulliver v.
Poyntz. Mich.
11. G. 3. C. B.
3 Wilson.

Sum. Sylv. 286.

If a lessee for years give his term by his *will* to *A.* he shall have it without paying any rent, for the executors shall pay it for him,

as

Ibid. ut sup.

as I find in the summist; but against reason, methinks.

Ibid. ut sup.

If one bequeath his indenture of lease, his whole estate in that lease passeth. So if one bequeath his obligation or other specialty, the debt or duty itself shall go to the legatee; and by the canon or civil law the very action itself passeth, *viz.* as I conceive, ability to sue the debtor in his own name: but in our law it is otherwise, the suit must be in the executors name, for a debt or thing in action cannot be assigned, except by or to the king; and only at the common law is the debt recoverable; but the spiritual court may force the executor to sue, or let his name be used in the suit, for and by the legatee.

Yet 48 E. 3. 12. 13. it is admitted, that such a devisee of all goods, after debts payed shall have a duty resting in account.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corn, nor fruit growing on the ground, nor stone, nor timber prepared for building, as the canonists and civilians hold.

On the other side, if one bequeath the moiety of all his goods, the legatee shall have only the moiety of that which remains after debts payed; for that only is to be accounted the testator's which he hath *ultra æs alienum*.

Quæ. 36 H. 8. Dy. 59. Dy. ibid. supra, Sum. Sylv. 216.

By a bequest of all utensils or household stuff, plate nor jewels are not given.

If one bequeath to his wife all her apparel, she shall not have, as some civilians say, her ornaments of gold or silver; by which is meant, as I take it, chains, jewels, bracelets, rings, &c. But others are of contrary opinion, except they be such things as are not lawful for her to wear.

If

If a bed be given by a *will*, *Veni ornamentum ejus*, saith the civilian, that is, the furniture thereof passeth, *viz.* not only the bed, bedstead, bed-cloaths, but also the curtains and valants, as I take it. But I think that by gift of a coach by *will*, the coach-horses pass not; yet perhaps the furniture of the coach-horses may pass as appertenant to the coach: for so I think they shall do, rather than by bequest of the coach-horses without the coach.†

If one bequeath to *A.* meat, drink and cloathing, or *Alimenta*, he shall have, saith the civil law also lodging, habitation, and all things necessary for the maintenance of life, *viz.* as I take it, fire and washing, &c.

If one bequeath to his daughter ten pounds a year for her apparelling, and she demandeth none in four years now shall she not after that time have the arrearages of this ten pounds by year for the time passed.

If a man bequeath one of his horses or cows, not naming which, to *J. S.* he is to chuse which he will, so it be not the best of all, saith the civil law: and perhaps the mention of that exception grows, out of respect to the herriot, which the lord should have, or the mortuary, which the parson should have.

A Man bequeathed thirty pieces of twenty shillings to *A.* twenty to *B.* and ten to *C.* to be

† If a man desires his silver tea kettle and lamp with the appertenances, nothing shall pass but the kettle and lamp, and the box wherein the lamp was placed, and not the silver tea-pot, milk-pot, tongs, strainer or canisters, Eq. Caf. Abr 201. Moseley 47.

had in such a chest or casket, and it is found after his death that there be but thirty in all in that casket or box; now each shall be abated ratably, saith my summist, so as *A.* shall have fifteen, *B.* ten, and *C.* five; and this stands with good reason and justice; for so each hath a proportionable part. And it was reasonable that it were by parliament established for law, that all, both legatees and creditors, should be payed in like proportion, where the state will not suffice for full payment of each, rather than that an executor should have power to pay one all, and another nothing: yet if the testator left sufficient to make good all those sixty pieces bequeathed, *Quere*, if that which is wanting in the casket shall not be supplied and made up; for if the cases following found with the same author be good law, it should seem so to be.

Sum. Sylv. 286.

If one, saith he, bequeath to *J. S.* that which is another man's, and whereto the testator hath no right; then ought his executor to buy it, and give it to the legatee, or else satisfy him to the full value; and this, not only by the civil, but also by the canon law, and *in foro conscientia*, saith my author.

Ibid. 287.

Again, if *A.* bequeath to *B.* such an horse by name, and after sell away that horse, and dieth; now is his executor bound to answer the value thereof to *B.* and if the testator, after his sale of that horse, had bought another and called him by the same name as the first; now shall this later horse pass to *B.* saith the book, except it can be proved that the testator sold the former horse of purpose to revoke his *will* touching that bequest.

Ibid. 216.

So again I find, that if one having but a moiety or one half of a green close, or of a stack of corn, or other chattel, doth give the whole, so as the words be apparent to reach to more than his moiety, then must the executors buy out the other's part for the legatee, or give him the value: but if the words be but general, so as they may be reasonably satisfied with the testator's part, no supply shall be made. So also if one, having goods in pledge, bequeath them, it shall be construed to extend no further than his right.

A bequest is made of an hundred pounds to be payed at a future time, *viz.* divers years after the testator's death; a question is made by the summist, whether the profit of the money in the mean time shall go to the legatee, or the executor: and he resolves with this difference, if the day were given in favour of the legatee being an infant who could not safely receive it any sooner, then he shall have the profit; but if the respite of payment were in favour of the executor, then shall the legatee have but the bare sum, without any addition of mean profits.

Ibid. 284. 2.

If one bequeath all his term or goods to his executor for payment of his debts, or debts and legacies, it is a void bequest; because it is no more than the law would say, if he had said nothing. So if it be generally to perform his will.

15 El. Dy. 331.

Plow. Com.

545. b.

Co. lib. 8. 96. 2.

If one, seized in fee-simple of land, bequeath it to his executor to pay debts, the executor hath no estate of freehold: for if he should, then it must be either for life, which might end by his quick death before debts payed; or in fee-simple, which would carry away the land for ever

ever from the heir, where perhaps a few years profit might suffice to satisfy the debts; yea then by death of the executor the land should descend to his heir, and not go to his executor, who would be executor of the first testator.

By deed or word in life, 4 E. 6. Bro. Done, &c. 43. Tr. 37 El. in B. R. Portman ver. Simmes or Willis, divers times argued.

If one give or grant all his goods, having leases for years as well as moveables, the leases shall not pass, as was held in the time of K. Edward the sixth. And so also was it admitted in *Portman's* case. For the word *Bona* comprehendeth only moveables, by the better opinion there. But the point in that case was pertinent to this place, viz. a bequest in a *will* of all the testator's goods: and whether thereby a lease for years passeth or not, was divers times debated, but not resolved, the judges differing in opinion in that point; but in another point, which made an end of the case, all agreed. Yet the better opinion was, as I find in my report, that a lease would pass by such words in a *will*, though not in a deed or grant by word otherwise made; for the legacies are demandable in the spiritual court, where *Bona & Catalla* are taken for all one. See also the statute of *Marlb.* giving an action to the successor. *Ad repetenda bona prædecess.* Yet an *Eject. custod.* hath been maintained thereupon. So also upon the statute of executors, *De bonis asportatis in vita Testatoris*, hath it been resolved, and where administration is granted, it is only *omnium Bonorum*, without speaking of chattels; yet hath the administrator interest in leases as well as moveables. On the other side, the statute *de Prerog. reg.* mentioning only forfeiture *de Catallis*, is clearly extended to moveables: so also in the writ of assize *De Catallis que in eo capta fuerint* and

Cap. 28.

4 E. 3. c. 7. So the stat. 5. R. 2. of forfeiture of goods by those who go beyond the sea, cap. 16. In all these goods are comprehend. 13 H. 7. Keiw. Rep. 33.a.

and in the writ of execution upon a statute there is only the *Catalla*, and not *Bona*: and in the case reported by *Kelway temp. Henry 7.* it seems *Bona & Catalla* were taken for *Synonyma*, or all one. It doth not appear that these statutes and writs were alledged or considered of, *temp. Edw. 6.* but in *Portman's* case the most of them were.

If one *will* that his wife, or any other, shall have, or hold, or enjoy the moiety of his lease with his executor, this implieth not that the executor have the other moiety as a legacy also, but otherwise as the law casts it upon him; no more than where the moiety of fee-simple land is devised to the younger son, this shall not make the elder son to have the other moiety otherwise than by descent, as between *Low* and *Carter* was conceived. But there being a proviso in the wife's bequest, that if she married from the house, then, *&c. Popham* ch. justice, held, that if she married at all, this was a marrying from the house; for she was no longer widow of that house, though she married with one of that kindred, and who had no other house, but would dwell in the bequeathed.

Low and Carter's case, Tr. 37 El; in Ban. Reg.

C H A P. XX.

Of the executor of an executor.

I Should be taxed of omission, if I should not shew whether the things forespoken of executors immediate extend, also to the mediate or more remote executors. Assuredly, were I not

See Plow. 184. 2. debt against the executor of an executor.

S

by

by the books otherwise informed, I should think it somewhat strange, that the mediate executor in the fourth, fifth or farther degree, should not by the rules of the common law, stand in like plight executor to the first testator, as the first and immediate executor; as well as the heir and assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate heir and assignee. And indeed, we find both in the time of *Edward* the second and *Edward* the third, execution sued out upon a judgment and statute by an executor of an executor; and why he might not as well maintain an action of debt, &c. I see not. But I must confess, I find both books to the contrary before any statute made in the point, and after an act of parliament to enable them to bring actions, and to make them subject to actions; yet the statute speaks nothing of conferring upon them the testator's goods. Now if they had title to them before that statute, it is strange if they should not be suable for debts. But since that statute, and at this day, where by a *will* a special trust is recommended to an executor, as to sell land, &c. this not performed in his lifetime shall not be performable by his executor: contrariwise of an interest, as to take the profits of lands for certain years towards payment of debts and legacies. And where the statute *temp. H. 8.* gives remedy to executors for recovery of rents of inheritance behind in the testator's life, I doubt not but executors of executors are within the equity, as well as within the statute 9 *Ed. 3. cap. 3.* that the executor who appears at the grand distress shall answer alone. Yet the statute *West. 2. cap. 23.* for executors,

19 *Ed. 2. & 14*
Ed. 3. Fitz. Exe-
cutor 87 & 103.

11 *Ed. 5. & 13*
Ed. 3. Fitz. Ex.
78. 25 Ed. 3. c. 5.

19 *H. 8, 9, 10.*
 4 *El. Dy. 201.*
 22 *H. 8. cap. 37.*
 See 32 *H. 8. 28.*
 Leafes. And 32
H. 8. cap. 33.
 Condition. And
 13 *El. cap. 5. &*
 27 *El. ca. 4. of*
 fraudulent con-
 veyances. 21
H. 8. cap. 15.
 for falsifying re-
 coveries. 39 *H.*
 6, 45. 7 *E. 3. 62.*

cutors, was not to extend to executors of executors. *Quod non est lex.* So as now in all cases, except of special trust or authority without the office of executorship, the executor of an executor, how far soever in degree remote, stands as to the points both of being, having and doing, in the same state and plight as the first and immediate executor.

The estate of the first testator is liable into whose hands soever it come. *Cb. Rep. 257. 30 Car. 2. cap. 7.* made perpetual by 4 & 5 *W. & M. c. 24. sect. 12.*

C H A P. XXI.

Touching Administrators.

OF these also, as standing in much affinity with executors, it may be by some expected that I should have treated. But first, my excuse is, that these of executors only having grown to so great a bulk above expectation, I was unwilling to enlarge it farther.

Secondly, that which in the points of having and doing is before set forth and shewed touching executors, may be applied to and understood of administrators; though not what is spoken of being and unbeing, or revocation of executorships, and other circumstantial points.

Lastly, I may perhaps, if these find good acceptance, add ere long that which appertaineth to administrators distinguished from executors, or wherein they stand in different state.

See more concerning administrators in the supplement to this treatise hereafter.

C H A P. XXII.

Considerations in conscience touching payment of debts, legacies, and the preferring or respect of persons.

TO the advertisement, what course executors are to hold in their payments, I thought good to add this *in foro Conscientiæ*; that when as it shall stand in the executor's *will* and election to pay whom he will, and as he will in respect of equality in the dignity and degree of the debts, all being for the purpose by the specialty, and none of record, and yet he hath not wherewith to pay or satisfy all, here he may have three ways or courses in his eye.

First, where there is equality in the honesty and conscience of the debts, there (except in the ability of the parties to bear loss the disproportion may otherwise occasion) methinks it should be most honest and just to pay every one proportionably, and to let the loss of every one to be equal. And the justness of this is taught by the law, which gives the *Audita querela* for equal contribution in bearing of loss by them who stand in equal degree: so of legacies.

2. The property and inability of some, and the plenty of others, may *in foro Conscientiæ* justify the paying more to one, and suffering him to lose less, (if any thing) than another. For if the widow's mite was a greater gift, so a greater loss than more out of abundance. Where charity finds or may find place or nearness to place of giving, it may find greater motives of preserving from loss: so of legacies.

The

The nature of the debts, and so sometimes of legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one than another, rate for rate, and so to suffer one to lose more than another. One debt may perhaps be use for money, or at least money lent for use; another may be money freely lent; another debt for land of inheritance bought; another debt for a lease, chattels or moveables, come to the executor. The first merits the least respect, next the second, then the third, and the last the most. But where without any of these motives there is not equality held in the payment, *peccatur*, (as I think) *in Conscientiam*. But let every one stand or fall by or to his own, or to him who is greater than his conscience. This equality Saint Paul in another case recommends to the *Corinthians*. And 2 Cor. 8. 14. Solomon, whilst no inequality appeared in the point of right, shewed his disposition to have made an equal division of the child between the mothers, who were joint claimers and competitors for it.

See more of conscience, *Doct.* and *Stud.*

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S U P L E M E N T

T O T H E

O F F I C E and D U T Y

O F

E X E C U T O R S.

T

SUP-

S U P P L E M E N T.

The divers definitions or significations of the words or terms, last will, testament, codicil, executor, administrator, devise, legacy, and gift in consideration of death.

ADAM by free donation, rather than primogeniture, had (*ab initio*) dominion over all the earth, which descending to his posterity, when they increased, was by them divided respectively into territories of particular dominion: for *Abel* having sheep and cattle, had consequently pastures of his own; and when *Cain* built the city of *Enoch*, in the land of *Nod*, he had consequently lands that were particularly his own: and when *Noah*, with his family, only remained living after the general deluge, the earth was divided by his posterity. And it appears by sacred scripture, that *wills* and *testaments* were in use among the ancient *Hebrews*; for *Abraham* had made *Eliezer* his heir if he had died without issue male. *Gen. 15.* And *Abraham* dismissing his other children with filial portions, he made his son *Isaac* his heir of all he had. *Gen. 25.* And *Isaac*, when *Esau* had sold his birth-right, appointed *Jacob* his heir and executor. *Gen. 27.* And *Jacob* likewise, by his *will*, gave to his son *Joseph* one portion above his brethren, which he took from the *Amorite* with his sword. *Gen. 48. 22.*

Vide ante p. 3.
In law most
commonly *ulti-*
ma voluntas
in scriptis is used
where lands or
tenements are
devised, and *te-*
stamentum
when it con-
cerneth chattels.
Co. Lit. III.

Now altho' testators and executors are said to be *Correlativa*, and that there is relation betwixt a *will* and an executor; yet because there may be a *will* without naming an executor, but no testament without an executor named; and an executor being appointed by testament, (which taken in the largest sense is the same with a last *will*) and hath the commencement of his authority and interest thereby, it will be requisite in the first place to declare, that although a testament and last *will* in some respects are both one thing, yet in other respects there is a diversity between them. For as a last *will* being a general term agreeth with every several kind of last *will* or testament; so testament being generally taken *quasi testatio mentis*, differeth not from a last *will*; for any last *will*, be it a codicil, or other kind, may in that sense be termed a testament: but a testament † taken strictly it is understood to be that particular kind of last *will* wherein an executor is named. By which it appears, that every testament is a last *will*, but every last *will* is not a testament.

Testament, what
post. p. 36.

But as no last *will* is of any force *sine animo disponendi*, so no testament is of any force *sine animo testandi*.

Codicil, what.

Codicillus, a codicil, is a diminutive, of *Codex* a book, and is most properly defined after this manner; *Codicillus est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri*

† The constitution of an executor is the essence of a *Testament*, Dr. Harris's Notes on Justin. Inst. 44. Edit. 1756. A testament may be made in five words, viz. LUCIUS TITIVS MIHI HÆRES ESTO. ibm.

vellet

vellet absque executoris constitutione. A codicil, is a just sentence of our *will* concerning that which any one would have to be performed after his death, without the appointing of an executor. By force of which words *absque executoris constitutione*, a codicil is made to differ from a testament: for as a testament cannot consist or be without an executor, so a codicil cannot admit of an executor, being an unsolemn last *will*. And codicils, when first invented, were only used when the testator had not opportunity to make a testament, by reason of the manifold solemnities thereof; or else as additions to the testament made when any thing was omitted therein; or something in such testament which the testator, upon better advice and consideration, would alter or retract. And a codicil may be made either in writing, or without; and by him which dieth intestate, or by him which dieth with a testament. And if it be made by a person which dieth intestate, the legacies therein given must be paid by him that shall have the administration of the goods of the deceased. And if the codicil be made by him which hath a testament, then whether the same be made before or after the testament it is reputed parcel thereof, and is to be performed as well as the testament: Unless being made before the testament it appear to be revoked in the testament, or to be contrary thereunto. And codicils and testaments do both agree in the efficient cause; because every person which can make a testament may also make a codicil *& à contra*, but they have divers contrary effects. For first, whereas no man can die with two testaments, because the latter doth revoke the former;

Vide hic post. p.
19.

mer; yet a man may die with divers codicils, and the latter doth not hinder or revoke the former. And secondly, If two testaments be found, and it does not appear which was the former or latter, both testaments are void; but if two codicils be found, and it cannot be known which was first or last, and one and the same thing is given to one person in one codicil, and to another person in another codicil, the codicils are not void, but the persons therein named ought to divide that thing betwixt them.

Definition of an executor.

Division, Vide ante p. 12.

Their beginning in the civil law.

Executor, *ab exequendo*, is he that is appointed by any man in his last *will* and testament to have the disposing of all his substance, according to the contents of the said *will*. This executor is either particular or universal: particular, as if this or that thing be committed to his charge; universal, if all. And this is in the place of him whom the civilians call *Herodem*, and the law accounteth him one person with the party whose executor he is, as having all advantage of action against all men, that he had, so likewise being subject to every man's action as far as himself was. This executor had his beginning in the civil law by the constitutions of the emperors, who first permitted those that thought good by their *wills* to bestow any thing upon good and godly uses, to appoint whom they pleased to see the same performed; and if they appointed none, then they ordained, that the bishop of the place should have authority of course to effect it. But now an executor is generally taken to be a person appointed by the testator to execute his last *will* and testament, and hath
the

the property or interest in the testator's goods and chattles, upon confidence to dispose them according to the *will* as the law directs.

Adminstrator, *ab administrando*, in our common law is taken for him that hath the goods of a man dying intestate, committed to his charge by the ordinary, and is accomptable for the same, and to answer debts and legacies as executors to the value of the goods of the dead, and no further, unless it be by his own false plea, or by wasting the goods of the dead; and if such administrator die, his executors are not administrators; but it behoves the ordinary to commit a new administration.

Administrator
what.

If no person will administer, the ordinary may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the intestate into his own hands, wherewith he is to pay debts and legacies so far as the goods will reach, and thereby he becomes liable in law as executors or administrators. But he that hath a letter from the ordinary *ad colligendum bona defuncti*, is not administrator, but the action lieth against the ordinary as well as if he take the goods into his own hands.

Letters ad colligendum.

Devise, (from the French word *deviser*, signifying *Sermocinari* to speak, for *Testamentum est testatio mentis, & index animi sermo*) is by the civilians termed a legacy, and in that sense is a gift left by the deceased to be paid or performed by the executor or administrator after his death; and it is called a gift, for that it proceedeth

Co. Lit. III.
Devise or legacy
what.

ceedeth of the meer liberality and free good will of the deceased. And in that it is left, it differeth from other gifts, not only those which are called deeds of gift executed in the life of the donor, but also from those gifts which be made in consideration of death, wherein the things given are delivered by the testator in his lifetime, to become their own to whom they are delivered in case the testator die. For legacies are not delivered by the testator, but are left to be paid or delivered by his executor or administrator.

Gift in causa mortis. Pre. in Ch. 269. it is not suable in the spiritual court. 2 Stra. 777.

A gift in consideration of death, is where a man in consideration of his mortality doth give and deliver something to another to be his, in case the giver die; but if the giver do not make express mention of his death, they cannot be revoked, but take effect from the time of making the gift, if the same be not fraudulent. And if a person deliver goods to be kept until he be dead, and then to be disposed or distributed *in pios usus*, in this case the person is executor of those goods, so to be by him distributed.

Thus having defined the general terms or things of which we are to treat in this supplement, we shall now descend to such particulars which are to be supplied or added therein. And first concerning,

Wills and Testaments.

A Testament is the true declaration of our last *will* in that we would to be done after our death.

Of testaments are two sorts. A testament in writing, and a nuncupative testament, which is when the sick man calls his neighbours and friends, and desires them to bear witness, and then declares his *will* by words, which after his death is proved by witnesses, and then put in writing by the ordinary, which is effectual unless for lands which are not devisable, but by testament put in writing during his life. *Termes del Ley. Co. Lit. III.*

Testamentum est duplex. 1. In scriptis. 2. Nuncupativum, seu sine scriptis. Vide ante Wentw. p. 6.

In some cities and boroughs lands may pass as chattels by *will* nuncupative: but in law most commonly *Ultima voluntas in scriptis* is used where lands or tenements are devised and *Testamentum* when it concerneth chattels. And by the same custom a rent may be devised out of lands or tenements. At common law no lands or tenements were deviseable by any last *will* and testament, nor ought to be transferred from one to another, but by solemn livery of seisin, matter of record, or sufficient writing; but by certain customs in some boroughs were devisable. *Coke's 1 Inst. III, III. Coke's 2. Inst. 7.*

But now by statutes 32 & 34 H. 8 and 12 Car. 2. which turneth all tenures into plain and common soccage, all lands and tenements are de-

devisable by *will* in writing of the tenant in fee-simple, whereby the common law is altered. And thereupon many difficult questions, and most commonly disinherison of heirs, do arise and happen. *Vide plus Coke's 1 Inst. 111.*

Swinb. 67.
2 Jones 210.
2 Mod. 315.
2 Vern. 469.
The age of 14
is now allowed
in chancery.
Vide ante p. 214.
post. p. 27.

An infant, at the age of eighteen years, or as some say fourteen, may make this testament, and constitute executors for his goods and chattels, *Coke's 1 Inst. 89. b.*

The maxim of common law is, that *Ultima Voluntas Testatoris est perimplenda secundum Veram intentionem suam.* And *Reipublicæ interest suprema hominum Testamenta rata haberi.* *Coke's 1 Inst. 322. b.*

A *will* countermanded by a feoffment, and judgment given for the plaintiff, although the title which he made for himself were destroyed. *Coke 8 Rep. 93. Fraunces's Case.*

The taking of husband and coverture at the time of her death, was a countermand of the *will* of the wife made before the coverture. *Coke's 4. Rep. 61. Forse and Hembling's Case.* *Vide ante p. 21. post p. 12.*

Co. Lit. 9.
5 Co. 21.
Cro. El. 378.
Cro. Jac 527.
Cro. Car. 158,
Bendl. 15.
2 Lev. 249.
2 Salk. 685.
2 Mod. Rep. 25.
1 Jon. 211,
1 Bulf. 194.
Cro. Car. 416.
Ackland and
Ackland.
2 Vern. 687.
Murry and Wife.
2 Vern. 564.

A man by *will* in writing deviseth part of his land to his daughter, and the other part to his wife for her life, with the profits whereof she should bring up his daughter; and that after her death it should remain to her brother, he paying to one twenty shillings, and other small sums, amounting to forty shillings. In this case, it was adjudged the brother had fee-simple; the value of the land being but three pounds *per Annum.* But if the devise had been, with the

profits of the land to educate his daughter, or with the profits of the land to pay so much as thirty or forty, or fifty shillings *per Annum*; it is but an estate for life, for he is sure to have no loss. *Coke's 6 Rep. 16. Collier's Case.*

It appeareth by *Glanville*, who was chief justice in the time of *H. 2. lib. 7. cap. 1. fol. 44. b.* That every freeman, without the assent of his heir, might dispose of a reasonable part of his lands with his daughter in *frank-marriage*, to some religious house to have divine prayers made for him in *frank-almoigne*, or to any servant in recompence of service, but all *that* must be in time of health; but if it were made in time of sickness, the consent and confirmation of the eldest son was requisite to it: and a man could not have given any to his youngest sons without consent of the eldest; but of land which he had purchased he might have given part to his youngest sons; and if he had no issue he might have given all to whom he pleased. And if lands are given to a man and his children, or issue, and he hath not any at the time of the devise, it is an estate tail, &c. And the statutes 32 & 34 *H. 8.* enabling the making of *wills* were made to the great disadvantage of heirs at the common law. *Vide plus Coke's 6 Rep. Wylde's Case. Cro. El. 525. Moor 422. 1 Vent. 225. 2 Lev. 58. 3 Salk. 126.*

Probate of a testament shewed forth under seal of the ordinary, yet the other party may plead that he who is dead died intestate: so if issue be taken upon probate of a *will*, or if administration

Wills and Testaments.

ministration were committed (although they shew the bishop's letters testimonial) it shall be tried by jury. And of divers manners of proof and trial, see *Coke's 9 Rep.* 32. Case of Abbot of *Strata Marcella*. *Vide ante p* 47.

The writ is *secundum consuetudinem eadem civitatis* hastenus obtentam & approbatam, &c.

When a man maketh a devise of lands in *London*, and also of his goods, then first the executors shall prove the same before the ordinary, and then after they shall bring the same before the Mayor into *London*, &c. and it shall be there inrolled; and then upon that inrollment the mayor, upon *Ex gravi Querela*, sued for the lands, shall do execution, and such process as upon a fine of lands, &c. And by the writ it appears, that a man may have a writ to the mayor to compel the executors to bring in the *will* to be proved before them in *London*, and to be inrolled in the hustings. The same in *Oxford*. And thereby it seemeth reasonable it be so done in every other city where lands be deviseable, that the executors and devisees shall have such actions against the ordinary; and also of the bailiffs of the towns and boroughs to prove such *wills*. *Vide plus de hoc*, and the forms of the writs. *F. N. B.* 459, 460 4^o Edit. & 198 b. 8^o Edit.

If the mayor, &c. will not prove the *will*, the devisee and executors may have a writ to compel them, and thereupon an *alias* & *pluries*, and an attachment if need be.

Executors assent necessary to a devise of chattels. but he hath no concern with lands.

Deviser is *French*, and signifieth *Sermocinari*; for *Testamentum est testatio mentis, & index animi sermo*, as is said before. Now if a man deviseth either by special name, or generally, goods or chattels, real or personal, and dieth, the devisee cannot take them without assent of the executor: but if a man is seised of lands in fee, and

and deviseth the same in fee, in tail, for life, or for years, the devisee shall enter; for in that case the executors have no meddling therewith. *Coke's 1 Inst. 111. a. Vide ante p. 27 & post. p. 168.*

And this devise of lands is good without any attornment of lessee or tenant. *Ibid. 112. a.*

An express warranty cannot be created by will; for a will in writing is no deed. But if a man devise lands for life, or in tail, reserving a rent, the devisee shall take advantage of this warranty in law albeit the ancestor was not bounden. *Coke's 1 Inst. 386. a.*

If a lord hath probate of testaments made within his manor, he cannot prove a testament made out of the precinct of his manor. *Coke 2 Inst. 231.*

The prerogative court of *Canterbury*, where all testaments are proved, when the party dying hath *Bona notabilia*, in some other diocess within that province, which regularly is to the value of 5*l.* but in the diocess of *London* it is 10*l.* by composition. The bishops, lords and commons, assent in parliament, that the King may make his testament, and several instances thereof. And if the King be made executor, he appoints persons to execute it. The probate of every bishop's testament belongs to his archbishop. *Coke's 4 Inst. 335, 338. Vide ante from p. 42 to 50,*

Fees of probate of wills limited by stat. 21 *H. 8.* and administrations also, *Ibid. 338. 21 H. 8. cap. 5.*

Bishops

Wills and Testaments.

Bishops anciently could not make their *wills*, but now they may, paying the King their best horse, and five other gifts; for which a writ goes out of the exchequer after their decease. *Coke's 4 Inst.* 338.

If *feme* sole make a *will*, and after take husband, the taking of husband and coverture at time of her death, is a countermand of the *will*. The making of a *will* being only the inception of it: for *Omne testamentum morte consummatum est: et voluntas est ambulatoria usq; extremum vite exitum.* Vide *Coke's 4 Rep.* 61. *Forse* and *Hembling's* case.

Lord Coke's advice to those who would devise lands by *will*.

The Lord *Coke* adviseth all who have lands, to settle and assure them by advice of council in time of health, to which they may add such conditions or provisoes of revocations as they please. But if you please to devise lands by *will*,

1. Inform your counsel truly of the estates and tenures of your lands.
2. It is good to make it indented, and leave one part with a friend, lest it be suppressed.
3. Call credible witnesses to subscribe their names at time of publication.
4. If it may be, let it be written with one hand, and in one parchment or paper.
5. Let the hand and seal of the devisor be set to it.

The sealing it not essential. *Godol. Orph. Leg.* 6.

If

6. If it be in several parts, let his hand and seal, and names of witnesses, be to each part.

7. If there be any interlining, or rasure, make a *Memorandum* of it.

8. If you make any revocation of all, or part let it be by writing, with good advice. *Coke's 3 Rep. 56. Butler and Baker's case.*

The custom of a city or borough concerning the devise of lands is, *Quod liceat unicuique civi sive burgensi, &c. Ejusdem civitatis sive burgi tenementa sua in eadem civitate sive burgo in testamento suo in ultima voluntate sua tanquam cattalla sua legare cuicunque voluerit, &c.* *Coke's 1 Inst. 111. a.*

Custom in a manor to devise copyhold without any surrender. *Co. Ent. 124.* Lands devisable in London by the custom. *Co Ent. 515.*

By law it is not sufficient that the testator be of memory, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason, (and that is such a memory which the law calleth *sane* and perfect memory). And upon such matter it was moved in the Marquis of *Winchester's* case, in *Coke's Reports*, to have a prohibition out of the court of *King's Bench* generally, to prohibit all the proceedings in the ecclesiastical court, as well for legacies and bequests given by the said *will* of the said Marquis to his reputed sons, or others, in the personalty, as for the lands; and the reason and ground of this motion was, that forasmuch as the *will* concerning the land, and the testament concerning the goods, are mixed together in one *will*, if the ecclesiastical court shall proceed

And as he ought to be of good, and sane memory at the disposing, so he ought to be when he revokes *Cro. Jac. B. R. Cranvell v. Sanders. p. 417.*

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concerning the testament of the goods ; it should prevent and prejudice the trial in this court : for if he were of *sane* memory at the time of making the testament of the goods, he cannot but be of the same memory at the time of making the *will* of the lands. And the common law ought to determine what shall be said perfect memory at the time of making the *will* of the land ; and therefore the prohibition should be general, *Quod fuit concessum per totam curiam*. And in *Hill. 38 & 39 Eliz.* it was ruled accordingly, and that no consultation should be granted for any party till the matter were tried in that court. *Coke's 6 Rep. 23. Marquis of Winchester's case.*

What words are necessary in *wills* to make an estate in fee-simple, fee-tail, or for life, and what in deeds ; and how the intent of the party in *wills* is chiefly to be observed. See *1 Inst. 9, b.*

This doctrine is now exploded, for the devisees shall be joint-tenants where the same thing is devised to two persons in a *will*.

Testamentum is *Testatio Mentis*, and favourably to be expounded according to the meaning of the testator, *In contractibus benigna, in testamentis benignior, in restitutionibus benignissima interpretatio facienda est*. There being divers *wills* or divers devises of one thing, the last *will* and last devise shall stand. *Coke's 1 Inst. 112. a, b.*

4 Mod. 89.

Style. 281.

2 Lev. 91.

1 Mod. Rep. 100.

1 Salk. 2. 6.

Pasc. 1729.

Barry & Edg-

worth, Cro. Car.

447. 1 Rol. Abt.

834.

All my estate in a *will* passeth a fee. *Cases in chanc. 262. Tirrel against Page. †*

If a feoffment be to perform his *will*, there the feoffer is still seised, and the land passeth

† 1 Wilton. 333. *Frogmarten v. Wright*, Easter. 13 Geo. 3. 3 Wilton.

by

by the *will* and not by the feoffment: but if the feoffment be to the use of such person and persons and of such estate or estates as he shall appoint, it is otherwise. *Coke's 1 Inst. 271. b.*

All *wills* concerning lands shall be deemed (only as against creditors upon bonds, or other specialties, the executors, &c.) to be fraudulent and void. *Stat. 3 & 4 W. & M. 14 Wingate's Abridg. Frauds 1, 2, &c.*

And such creditors may have actions of debt against the heirs and devisees jointly, &c. But devises of lands for payment of just debts or childrens portions, other than the heir at law, in pursuance of marriage agreement in writing before marriage shall be in force. *3 & 4 W. & M. c. 14.*

No testament may be inrolled in the hustings, *London*, unless the testator put to his seal: but testaments that may be found good and legal are effectual, although not inrolled or of record.

The testament there ought to be adjudged effectual and executory, having regard to the testator's *will*, although the words be defective, and not according to common law.

And as lands and tenements, so rents and reversions; may be there devised, and distress made for them, without clause of distress. *City Law, P. 4, 5.*

The ordinary, &c. shall not be charged for putting their seal to a *will*, not knowing the same to be forged. *Wing. Abridg. Forging of deeds.*

A feoffment to the use of his *will* and to the use of him and his heirs, is all one.

When a man maketh a feoffment to the use of his *will*, he hath the use in the mean time.

2. If in such case the feoffor by his *will* limit estates according to his power, there the estates take effect according to, or by force of the feoff-

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ment,

ment, and the use is directed by the *will*, so that in such case the *will* is but declaratory. But if in such case the feoffor by his *will* in writing deviseth the land itself, as owner of the land, without any reference to his authority, there it shall pass by the *will*: for the testator had an estate devisable in him, and power also to limit an use, and had election to pursue which of them he would. *Coke's 6 Rep. 18. Sir Edward Clere's case, post. 170.*

Acts of parliament and *wills* shall take effect, although corporations, &c. be not rightly named, if it may be known what is meant, otherwise it is in deeds. *Coke's 10 Rep. 57. Chanc. of Oxford's case.*

The dead man's third-part must go according to the statute of distributions where he dies intestate, viz. two-thirds to the children, and the other third to the wife, and the dead man's third not at all under controul of the custom. Trin.

1718. *Walsam & Skinner,*
2 Vern. 59.
See the Stat.
11 Geo. 1. ch.
18 sect. 17 &
2 Wins. 527.

By the custom of *London* a freeman's widow may require a third-part of his personal estate, after debts and funerals paid and discharged, and his children may require another third-part thereof; and he may by *will* give away another third-part of his estate; and, if he have no children, the widow may require a moiety of his personal estate. But if a freeman die without a *will*; administration shall be granted to his wife, and he shall claim one third-part by the custom, and one third-part must be divided among the children, and the other third-part between the wife and children; and usually the woman is allowed two thirds thereof. *Privilegia Londini 279, See Eq. Ca. Abr. chap. 23.*

A freeman by his last *will* cannot prejudice his wife concerning her third-part, yet in his life-time he may give them away. *Privilegia Londini, fo. 123.*

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The custom of *London* is, that if the father advance any of his children with any part of his goods, *that* shall bar them to demand any other part of his goods; unless the father under his hand, or in his *Last-Will*, do express and declare, that it was but in part of advancement; and then that child so partly advanced shall put his part in hotch-pot with the executors and widow, and have a full third-part of the whole, accounting that which was formerly given him as part thereof. And this is that in effect which the civilians call, *Collatio Bonorum*. *Coke's 1 Inst.* 176. *B. Trin.* 1699. *Chace & Box, Hill.* 1704 *Bright & Smith.*

In the statute 22 *Car. 2. cap. 10.* for settlement of intestates estates, is a proviso for saving the custom of *London, &c.* and thereupon it was adjudged in the case of *Percival*, an executrix, against *Crispe*, that the third-part of the goods of a citizen of *London*, dying intestate, appertaining by the custom to his administrator, is not subject to distribution by the said act of 22 *Car. 2. Privilegia Londini* 154. and *Sir Thomas Jones's Rep.* 204. *Stat. 1 Jac. 2.*

The laws of the realm, and the judges, who are interpreters of the same, do favour *wills*, devises and testaments, in yielding to them such a reasonable construction as they think might best agree with the minds of the dead.

The fee-simple of the copy-hold being limited to the use of the *will* of the copyholder, doth remain in the copyholder, and not in the Lord. *Coke's 4 Rep.* 24. *Copyhold cases.*

Wills and Testaments.

By *will* an estate of inheritance may pass without these words *his heirs*: as if a man devise ten acres to another, and that he shall pay to his executors ten pounds; hereby the devisee hath a fee-simple by the intent of the devisor, albeit it be not to the value of the land. So it is if a man devise lands to a man *imperpetuum*, or to give or to sell, or *in Feodo simplici*, or to him and to his assigns for ever. In these cases a fee-simple doth pass by the intent of the devisor; but if the devise be to a man and his assigns without saying (for ever,) the devisee hath but an estate for life. If a man devise land to one, *Et Sanguini suo*, that is a fee-simple; but if it be *Semini suo*, it is an estate-tail. *Coke's 1 Inst. 9 B.*

Note; When any one intends to plead any thing against the validity of a testament, they ought to do it at the time of proving it, or within a year after; unless they were at such time infants, or in travel beyond the seas, so as they could hear nothing of it, and then they shall have six months after they return from travel to plead against it, and the minors a year after they come to full age: and if such parties exceed their limited times, then they are excluded from any remedy, unless it be in case where the testament was not at first proved in form of law, but after the common form; for then they must cause the testament to be proved over again, at any time within ten years, and alledge what they can against it. *Refor. Leg. Eccles. Tit. de Testamentis, cap. 6.*

Also,

Also, if any shall exhibit a false testament, or Vide ante p. 242. any ways pervert a true testament, by adding, diminishing, changing or interlining the same, and is openly convinced of such crime; they shall be thereby excluded from all benefit accruing to them by such testament. *Ibid. cap. 39.*

Where the testator hath made two testaments, a former and a latter, and afterwards lying sick they are both brought unto him; and being desired to shew which he intends shall stand, and he saith, that the first should be his last will; or if he take that of the first date, and deliver it for his last will, then in such case that will shall stand, and the other shall be void. *Perkins sect. 479. Mich. 44 E. 3. fol. 33. Pacis Consultum, p. 81.*

Likewise if an executor be named in the first Vide hic ante p. testament, and none in the second will, then the first testament shall stand, and the latter shall be added only by way of codicil. *Swinb. part. 7. sect. 14. num. 5.*

If a man be so extreme sick that he is almost Vide Cro. Jac. at the point of death, and can scarce speak; yet ⁴⁹⁷ if he be of good understanding and sound mind, He ought to make it by his own directions, and not by questions. as may appear by his gestures and sensible speeches; in such case he may make his testament, so as it come of his own accord, and not at the earnest request or importunity of his wife Sty. 427. or some covetous person, who expects benefit of the same. See *Swinburn, part 2. sect 25.*

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If the friends of such a sick man, or any other persons, do without his knowledge prepare a *will* in writing, and bring it to him, and read it, and ask him if that shall stand for his testament, and he answers yes, and immediately after dieth: in this case such testament is not good, unless the testator had first uttered his mind to the writer or indicter thereof, or had requested them to write his *will*; or unless the testator being of perfect mind and memory had by plain and express words, or other apparent conjectures, confirmed the same, and not only by answering yea. *Swinb. part 2. sect. 25. num. 11.*

Though a man have sworn not to make a testament, yet notwithstanding he may lawfully make one; and if he have made one, and sworn not to revoke it, yet he may afterwards make another, and revoke the first; but then it is convenient that he revoke his oath also, and say I make this my last *will* and *testament*, notwithstanding my former testament, with the oath therein contained not to revoke the same. *Swinb. part 2. sect 24.*

A married woman cannot make her testament of any manors, lands tenements or hereditaments, by the statute of 34 H. 8. neither can she make a testament of goods or chattels without her husband's licence, except she be a queen or empress, or that she were executrix for some other person: for in such case she may make her *will* of such goods as she hath as executrix

Countess of
Portland and
Progers. c.
2 Vern. 104.
Cro. Eliz. 27.
Cro. Car. 219,
376, 597.
Mich. 8 Jac.
Graun's case.
Rol. Abr. 608.
1 Mod. 211, 212.
2 Mod. 172, 173.
34 & 35 H. 8.
cap. 5. Wills or
testaments of manors, lands, &c. made by feme-coverts, infants, idiots, or persons of non sane memory, shall not be good in law.

with-

without his licence, and name her executor, who shall have them to the use of the first testator, but she cannot give them away as a legacy; and if she die without *will*, yet in such case such goods as she had as executrix (of which the property is not altered) shall not go to the husband, but administration thereof shall be committed to the next of kin to the first testator. But in both these cases the husband shall have the profits arising of the same; as calves, lambs, and such like profit of kine and sheep. Also, if the wife have goods by way of legacy from another person, in such case she cannot make a testament, or dispose of the same without his licence. Note; Though the husband do give licence to a wife to give away part of his goods, yet notwithstanding he may countermand her testament again, either before or after her death, or at least before the probate thereof. But if the wife make her testament of his goods, and the executors prove the same, and the husband delivers the goods to the executors, then he cannot countermand the testament, though the wife made it without his licence or knowledge. For by this after-act the law presumes he gave consent at the first. 34, 35 H. 8. c. 5. *Braet. lib. 2. c. 26, Vide ante from 197 to 203.*

A wife, whose husband is banished for life by act of parliament, may make a *will*, and in every thing act as a feme sole; and the legates under the Lady Sandys, whose husband, was so banished, in the case 2 Vern. 104. were decreed their legacies.

One that is blind may make a nuncupative testament, by declaring his *will* before a sufficient number of witnesses, but he cannot make his testament in writing; unless the same be read before witnesses and then acknowledged by him to be his last *will* and *testament*; for if

he should acknowledge a writing for his last *will*, and do not hear it read, this will not make it amount to a *will* in writing. *Swinb. part 2: sect 11. and num. 1, 2.*

By 29 Car. 2. cap. 3. No *will* in writing of any personal estate shall be repealed by words only, except the same be, in the life of the testator, committed to writing, and read to him, and allowed by him, and that proved by three witnesses, sect. 22.

A codicil may be added by parol to a *will* in writing, and this parol codicil shall be put in writing, and affixed to the *will* as a codicil; and this may as well be done, as a *will* in writing may be revoked by parol, concerning goods in the life of the testator. *Hil. 22 Car. 1. & Pasch, 23 Car. 1. in B. R. Vide stat. 29 Car. 2. c. 3. Against frauds and perjuries.*

And the usual form of a codicil is as followeth, *viz.*

*Be it known unto all men by these presents, That whereas I A. B. of C. &c. have made and declared my last will and testament in writing, bearing date, &c. I the said A. B. by this present codicil, do confirm and ratify my said last will and testament, and do give and bequeath unto D. E. of F. my, &c. And my will and meaning is, that this codicil or schedule be, and be adjudged to be part and parcel of my last will and testament; and that all things herein contained and mentioned be faithfully and truly performed, and as fully and amply in every respect, as if the same were so declared and set down in my last will and testament. In witness whereof I the said A. B. have hereunto set my hand and seal this day of
Anno Domini 17—*

Where

Where and how persons inhabiting in the province of *York*, and in *Wales*, may by *will* dispose of their personal estates, see the statutes 4 and 5 *W. & M. cap. 2.* and 7 & 8 *W. 3. cap. 38.* and hereafter in *Executors.*

All *wills* and *testaments* are proved and recorded either with the register of, 1. The prerogative. 2. The proper diocese. 3. the peculiar : or 4. The visitant for the present.

In all cases where the deceased hath or had goods, chattels, credits, or other personal estate, to the value of five pounds or upwards, at the time of his decease, out of the diocese where he lived, and was resident or died, the *will* of the deceased is proved and recorded in the *Prerogative* for the whole estate. The records of the *Prerogative* court, are as ancient as *Sep'timo Richardi Secundi, Anno Domini 1383.* And it hath none more ancient as appears by their kalenders, which are with very good order made up and disposed. For all such *wills* as are of more antiquity, you shall search for them with the general register of the archbishop, in whose office both these businesses were carried till the division of the same, made at the time aforesaid.

The same rules and observations are to be held in matter of administration of goods, &c.

In case where the whole personal estate of the deceased doth or did, at the time of his decease, remain or be within the diocese where he lived, and was resident or died ; so that the value of five pounds, or upwards thereof, is not or was

By 2 Ann. cap. 5. the privilege given by 4 & 5 W. & M. to dispose of their personal estates as they think fit, is extended to the city of York, excepted out of the act of W. & M. Where *wills* are to be proved and administrations granted.

not

Wills and Testaments.

not (at such time) in any other diocess; the *will* of such deceased is proved and recorded in the proper diocess, with the register of the archdeacon, or his official of course, or the commissary.

And in the bishop's *Visitation*, with his chancellor or commissary, with reservation only to the peculiars, together with the benefit of general visitation.

Note, That by reason of the familiarity between the bishop's commissary and the archdeacon, commonly you may find *wills*, not being of prerogative nature, so soon (sometimes) with the one as the other.

The like rule is of administrations in the diocess.

Only Note, That sometimes you shall find *wills* proved, and administration granted, in several diocesses (*quoad*) unto several parts or parcels of the estate of the deceased, lying and being at the time of his death so separated and divided: And sometime those which of right are proved, or granted and recorded in the prerogative, to be likewise called to be proved or recorded in the proper diocess.

For such *wills* as fall in time of visitation, either of the archbishop or bishop of the diocess, you must search for them according to the rule of their times, and years of their *Visitation*, wherein they are very certain.

Heretofore, when the pope had power of visitation in *England*, he took likewise probate
of

of wills, &c. which may be very well now missing *inter alia*.

You may note, That there be some wills of the deceased, which cannot be found with the register of any court christian, and yet are extant in the chapel of the rolls of chancery, or the tower, in their offices *post mortem*.

Where some wills may be found.

And lastly, some wills which cannot be found either with the register of court christian, or in chancery, may (in case, *inter alia*, where the deceased hath devised any thing to any society or body politic) be found inrolled in the house, college, hospital, hall, abbey, &c. to whom such things were devised, or amongst the records of such societies dissolved, or amongst the evidences of such, unto whom the same things so given have since come, if you pursue the same.

A will which doth only concern lands ought to be proved in the chancery; but if it be a mixt will, and concerns lands, goods and chattels, it may be proved in the spiritual court.

Probate in chancery, in what case.

Probate of a will of lands in the spiritual court, is no evidence at the common law; the witnesses being there examined, their examinations shall not be given in evidence at common law. *Cro. Car.* 396. *Netter's case.* 1 *Bulst.* 199. *Semain's case.*

So that the heir cannot be prejudiced by such probate of a mixt will.

A will of lands need not be proved in the spiritual court but a will of goods must be proved there otherwise he can bring no action. *Cro. Car.* 165.

In the case of Hill & Thornton a consultation was granted to proceed quoad bona.

Executors come to prove a will, the ordinary must do it *ex communi jure*; but if other
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Wills and Testaments.

executors come to prove a latter *will*, it must be *per Testes*. *Hetley*, p. 77.

A nuncupative *will* is not pleadable in any court before probate. *Cases in chancery* 192. *Verborn* against *Brewin* and others.

— A perpetual injunction accorded against the defendant not to prove a *will*, touching a personal estate only in the prerogative court. But note, That in this case it was directed by the court of chancery to be tried, whether a *will* or no; and it was found against the *will*, and then the injunction was awarded, *Cases in chanc.* 86. *Beversham* against *Springold*.

2 R. 5. 3.
Vid. 1 Vern.
330.
2 Vern. 209.
Cotton & Cotton.

If a man make a *will* and devise of his lands, and after disagreeing to it, he makes a feoffment, and taketh back an estate in fee, and dieth: this land shall descend to the heir, and shall not pass to the devisee without express agreement, that his mind was that his former *will* should take place. *Lib. Ass.* 44. *Dyer* 143. *Pl.* 55. 44 *Ed.* 3. 33.

A man made a feoffment to perform his last *will*, and his *will* was annexed to the charter of feoffment, and livery of seisin thereupon made accordingly: it was adjudged, that he might alter and revoke this *will*, although it took effect by the livery. *Dyer* 49. *Pl.* 12.

A. obtains a judgment in debt, he makes his wife and two daughters his executrixes, and dies, the wife alone proves the *will*, reserving the power of administering to the two daughters when they come in; the wife alone may sue a *Scire facias*, she averring, that both the
daugh-

daughters are under the age of seventeen. 1 *Modern Rep.* 297.

If a *will* be proved before the metropolitan, where there is not *Bona notabilia*, and so it ought not to be proved there, yet it standeth good till it be reversed by some sentence of appeal; but if it be proved in any inferior court where it ought not, it is meerly void. *Coke's 8 Rep.* 136. *Co. 5 Rep.* 30. *Co. 1 Rep.* 150.

For the metropolitan hath jurisdiction over all the diocesses within his province. *Vide infra p. 118. supra p. 46.*

By a canon law made, 1 *Jac. c.* 19. If one die intestate in a journey, the goods he hath then about him shall not give the archbishop prerogative to grant administration there.

It is the proper jurisdiction of the spiritual court to determine at what age an infant may make a *will*, and an executor of his goods, and if that court gives sentence against the law, the party grieved may have remedy by appeal, and not by prohibition. *Jones* 210. *Brown's case. Vide ante p.* 213, 214.

The age of 14 is now allowed there and in Chancery.

The husband may dispose of his wife's *Paraphernalia* by his *will*; and if he doth not, they go to his surviving wife; but she cannot take them without his executor's assent, unless the husband by his *will* especially appoint that she may take them without such assent. *Cro. Car.* 343. *Lord Hastings* against *Douglafs.*

If he does not, she may claim them (in case there be no debts). Agreed in 2 *Vern.* 246.

Ejectment, and upon *Non Cul.* special verdict found that *Edward King* was seised of the tenements in question in fee, and 29 *Nov.* 1679. Devised them to his daughters, *Diana* and *Susan*, and their heirs, and that the *will* was duly

2 *Vent.* 350.
1 *Show.* 89.
3 *Mod.* 206,
218, 220, 259.
1 *Sid.* 90. 315,
362.
2 *Sid.* 75.
Rayn. 225, 240.
334. *Ow.* 70.
2 *Danv. Abr.* 529.

Gold. 33. *Cro. El.* 306. *Cro. Car.* 51, 52. *Cro. Jac.* 115, 497. made

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made and signed, according to the statute of frauds and purjuries, and the name *Edw. King* subscribed at the bottom of the *will*; and they found that *Edw. King* afterwards having intention to revoke the *will quoad Dianam*, who was married, and her portion paid to the lessor, directed the following words to be subscribed upon the same *will*. viz. *We whose names are under written do testify, That the above-named Ewd. King did, the day of the date hereof, publish and declare, that the several clauses and devises in his will, any way relating to his Daughter Diana, should cease and be void, she being since married, and her portion paid. In witness whereof we have hereunto set our hands this 28th of October 1680. J. S. J. D. F. N. and G. W.* And that the said words were writ under the said testament upon the same paper by the direction of the said *Edw. King*, and subscribed by the said four witnesses in his presence: but they further found that the said writing so as aforesaid subscribed, was not subscribed by the said *Edw. King*, or any other, by his direction, or his authorising. And that after the death of *Edw. King, Diana* and her husband entered and demised to the plaintiff, and if the defendant were guilty, they found for a moiety for the plaintiff, and for a moiety for the defendant. And note, That the words of revocation were writ upon the same paper, and the same side of the paper upon which the *will* was written, but under it immediately under the name *Edw. King* subscribed to the *will*. And if this revocation, as to *Diana*, was good according to the said statute

tute of frauds and perjuries, not being subscribed by *Edw. King*, was the question. And note, The clause for making of *wills* directs all *wills* to be subscribed by the testator; or some other in his presence, and by his direction, and attested by three or four witnesses, and subscribed in his presence. And the clause touching revocations saith, that no devise shall be revocable, but by some other *will* or codicil in writing, or other writing declaring the same, or by cancelling, &c. by the testator himself, or in his presence, or by his direction; but all devises shall remain good till revoked or altered by some other *will* or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same; any former law to the contrary notwithstanding. And upon the first argument, *North*, chief justice, and *Levinz*, held, that forasmuch as the devisor's intent appeared plainly in writing, and so no doubt of fraud or perjury, that the subscribing by *King* upon the same paper shall serve for the whole; and it is not material whether it be signed in the top or bottom of the *will* or writing: for the statute doth not say *subscribed* but *signed* by the testator. But in another term, *North* being removed into chancery, and *Levinz* sick, rule was given for judgment for the plaintiff of the moiety, by *Pemberton* then chief justice, and *Windbam* and *Charlton*, *Nisi causa* at another day, at which day *Levinz* then being present, day was given to another day the next term, and if any be entered *Quere. Levinz 3 part*

29 Car. 2. cap.
3. sect. 6.

part 86. *Hilton versus King, Hil. 34. Car. 2. in B. R.*

Devise of a possibility not made good in equity.

Doctor *Berry* seized in fee, by will devised the land in question to serjeant *Fountaine*, and his heirs in trust. 1. To sell part for payment of his debts. 2. Till the debts paid, to pay 100*l. per Annum* to his natural daughter *Mary*, and after the debts paid 300*l. per Annum* for her life; and, if she have children, to convey successively to those children: if sons, at their full age; if daughters, to them all; but so, as the husband she marries, take the name of *Berry*. 3. For want of such issue, or if such issue die without issue, he devises *Hemsworth* and *Kingly* park, the lands principally in question, to be conveyed to the eldest son and heir of his nephew *John Cater*, and the heirs of such eldest son; and gives the said eldest son an annuity of 40*l. per Annum*, till such estate shall come to him: but if he claim any thing during the life of *Mary*, or any of her issue, then both father and son to be excluded from having any thing out of his estate. The eldest son of *John Cater* was *Anthony*, who had two sisters, the defendants *Bradshaw* and *Todd*, Daughters of *John. Anthony* died, and left issue *John* his son, who in the life of *Mary* devised the lands in question to the plaintiff, and died without issue. *Mary* after died without issue: the heir of *Fountaine* conveyed the lands in question to *Bradshaw* and *Todd*, sisters of *Anthony*, and heirs of him and also of his father *John. Bishop* brings this bill to have the lands conveyed to him, supposing the equity to have this estate was vested in *Anthony*, and
so

so well devised to him by *John* the son and heir of *Anthony*. But the lord keeper, assisted by the chief justice *Treby*, and *Powell* baron of the exchequer, after several arguments and long consideration of the authorities cited on both sides, resolved, that *John* had no estate devisable, but a meer possibility during the life of *Mary*, or any of her issue, and so the devise to the plaintiff void, and the lands well conveyed to the defendants *Bradshaw* and *Todd*, sisters and heirs of *Anthony*, and dismissed the bill, but without costs, provided he acquiesce, and give them no farther trouble in this court. *Levinz 3 part 427. Bishop versus Fountaine, Bradshaw and Todd, in cancellar'. 7 W. 3.*

Error upon a Judgment in ejectment, where upon special verdict the case was, *Robert Berger* had issue his first son *William*, who had issue the wife of the lessor, and a second son *Robert*, who had also a son *Robert*, grandson to the first *Robert*. *Robert* the grand-father devised the lands in question in these words; *I give my land in Tilling to my son Robert and his heirs; and I give to my grandson Robert 50 l. Also I give to my great grand daughter J. S. 100 l. Robert* the second son dieth in the life of his father, after which *Robert* the devisor made a codicil, by which he deviseth part of the lands which he had devised to *Robert* his son to *Judith* his daughter, and after that he republished his will by word without writing; and said, that *Robert* my grandson shall have or take by my last will as *Robert* my son should have done and afterwards died. And the question was, if

Wills and Testaments.

Robert the grandson, being the defendant in the ejection, and also here, should have the land by virtue of this *will* and republication, or the wife of the lessor, daughter and heir of *William* the first son. And it was adjudged in the common pleas, by the opinions of *North* chief justice, *Atkins* and *Windham*, against the opinion of *Scrogs*, that *Robert* the grandson should have it. And now it was argued that this judgment was erroneous, because that, 1. Grandson and son are different names of appellation, and denote different persons. 2. Lands may not pass by *will*, unless it be in writing. 3. The deviser himself took notice in his *will* of the difference between son, grandson, and great grandson, and made devises to several persons by these several names. 4. The republication by word would not supply the defect of this *will* which being of lands ought to be in writing. 5. The republication itself took notice of the diversity of the appellations, *scil.* My grandson *Robert* shall have, &c. as my son *Robert* should have had. It was agreed, that the republication would aid a *will*, if words are in it capable to be aided. As the Lord *Cheney's* case, a devise to *William*, and he had two *Williams*, it might be averred which *William* was intended, because the word *William* was in the *will*: and 3 *Cro.* 493. *Beckford* and *Parnecote*, a devise of all his lands in *Aldworth* and after the *will* he purchased others, and then republished the *will*; all pass, because words sufficient in the *will*. But here he hath the word grandson in the *will* in writing, and this case is all one with *Bret* and

Cro. El. 493.
Beckford v. Parnecote.

and *Rigden's case*, *Plowd. Com.* and *Hartrop's case*, 3 *Cro.* 243. and the opinion of *Popham* and *Farmer*, in *Fuller and Fuller's case*, 3 *Cro.* 422, 423. is denied by the other two judges there, *scil Gaudy* and *Clench*, and the case their adjudged in another point. But for the defendant in the error it was said, here is a good foundation in the words of the *will*, and the intention of them may be supplied by matter *dehors*. *Grand* is no other than an addition to *son*, for to distinguish between son and grandson, both being in life at the time of making the *will*; but when the son was dead, as he was at the time of the republication, the grandson might well be understood by the name of son. And if a man hath no son, but a grandson named *Robert*, and deviseth lands to his son *Robert*, the grandson shall take them, according to the opinion of *Walmsley. Owen* 88. And here, although that at the making of the *will* he had a son *Robert* and a grandson *Robert*, yet at the republication, which is a new making of the *will*, he had only a grandson *Robert*; he taketh it by the name of son, so long as the name of baptism is rightly expressed, and there is no other to take it. *Scroggs*, then chief justice in *B. R.* held to his former opinion which he held in *C. B.* and said, that he was not at any time satisfied with the judgment there, and that the judgment ought to be reversed. *Dolben*, justice, *semble contre, ceteri nil dixerunt, et adjournatur*. But after, as *Levinz* heard by others, the judgment was reversed. *Levinz* 2 part 243. *Strode v. Berager*.

Bret and Rigden, Trin 10 El.
Plow. Com. 345.
Hartrop's case, in *Curia Wardor'* was not resolved, Cr. El. 243. but a *Melius Inquirendum* awarded, because office was not fully found. Trin. 33 El.

Fuller v. Fulley
 Cro El. 422.
 Mich. 37 & 38 El.

See 1 Vent. 341.
 1 Mod. 267
 2 Mod. 313.

5 Mod. 74, 75.
2 Salk. 689.
513, 534.

Hawkins, being a prisoner in *Newgate* for opprobrious words against the mayor of *London*, and under some distemper of mind, but having great personal estate to the value of 10,000*l.* made his *will* there, attested by several witnesses; and upon hearing the cause in the prerogative court, sentence being there against the *will*, and administration committed, the cause came by appeal before the delegates at *Serjeant's-Inn* in *Fleet-street*, scil. *Lloyd* Bishop of *Litchfield*, *Lloyd* Bishop of *St. Asaph*, *Treby* Chief Justice of the Common Pleas, *Rokes*, by Justice, *de eadem Cur'*, and *John Powel*, junior, one of the Barons of the Exchequer, *Dr. Oxenden*, and other civilians; where, for avoiding of the testimony of two witnesses to the *will*, were produced two records, by which they were found severally convict; the one, for publishing a Libel; the other, for singing a song against the government, and both adjudged to the pillory. But no proof was that they were put into the pillory, but only the records produced. And after their examination in the ecclesiastical court, but before the sentence there, came the general pardon by which they were pardoned. And the question was here, whether their examination and testimony given in the ecclesiastical court should be admitted for evidence? And 1. It was admitted, that they being convict, and adjudged to the pillory at the time when they gave their testimony in the ecclesiastical court, the pardon afterwards doth not make their testimony good, if it were not good when it was first taken. 2. That the judgment of pillory made the infamy, although that they were not

2 Wilton 18.

2 Wilton 18.
contra.

at any time put in the pillory. But 3. The great question of the case was, whether the conviction and judgment for these crimes shall make them infamous, and destroy their testimony, notwithstanding the judgment of the pillory? For it was said of the one part, that the books, as *Britton, Co. 3 Inst. &c.* which speak of the infamy by the judgment of the pillory, speak of the judgment of the pillory for such crimes which import deceit and fraud; as cheats, &c. and that it is from the nature of the crime that the infamy arises, and not from the judgment. To which it was answered, that it is the judgment upon which the infamy ariseth, and not from the nature of the crime. And if one be convict of cheating, yet he may be a witness if he hath not judgment of the pillory for it. Secondly, it is said, that pillory, although it infer infamy by the common law, yet by the canon and civil law (by which they are to be adjudged in this case of a *will*) doth not import infamy, unless the cause for which they are adjudged be infamous; and to that the civilians seemed to agree. And after the council were withdrawn, for this cause only, as *Rokesby* and *Powel* afterwards said to *Levinz*, the matter not being infamous by the canon and civil law, the depositions of the witnesses were admitted for evidence notwithstanding the judgment of the pillory, *Per tout le Court*: and the sentence in the prerogative court reversed, and the *will* sentenced to be good. *Levinz 3 part 426. Chater & alii versus Hawkins, executor of Hawkins. Trin. 7 W. 3. Before the court of delegates at Serjeant's-Inn, in Fleet-street.*

And now having supplied what I have found necessary to direct testators in the due and legal forming of their *wills* and testaments, we are next in course to direct the true and regular execution and performing of them: which leads us to treat concerning

Executors.

E*xecutor*, is when a man makes his testament and last *will*, and therein nameth the person that shall execute his testament, that is his executor; and is as much in the civil law as *Herres Designatus* or *Testamentarius*, as to debts, goods and chattels. And such an executor shall have an action against every debtor of his testator: and if the executor hath assets, every one to whom the testator was indebted shall have an action against him, if he have an obligation or specialty; but in every case where the testator might wage his law, no action lies against the executor. *Termes del Ley verb. executor. Vide hic ante p. 2. ante Wentw. p. 3.*

Assumpsit lies against the executor, there being no wager in that.

F.N.B. 193.
E.g. F.N.B. 87.
Vide ante p. 85.

Executors may bring a writ of trespass for cattle, corn, &c. taken of the testator's. *F. N. B.* where you may see the writ.

Action of accoupt lieth for, but not against executors. *F. N. B. 257. English.*

If he accepts the executorship,
Hawk. Abr. 352.

Where the obligor makes the obligee his executor, though the action be gone, the executor may retain. *Coke's 1 Inst. En le Table. Coke's 1 Inst. 264. b. Vide ante p. 143.*

The testator and executor are *Correlativa*; and therefore if a lease for life be made to the testator, the remainder to his executor for years, the chattel shall vest in the lessee himself, as well

well as if it had been limited to him and his executor. *Coke's 1 Inst. 54. b.*

If guardian in socage make his executors and die, the heir being within the age of fourteen, the executor shall not have the wardship but another, the next friend, to whom the inheritance cannot descend. *Coke's 1 Inst. 90. a.*

For the guardian in socage had the wardship to the use of the heir, otherwise of guardian in chivalry, whose executors shall have it, for he had it to his own use.

Funeral expences, according to the quality of the deceased, are to be allowed out of the goods, before any other debt or duty whatsoever; for that is *Opus Pium & Charitativum*, *Coke's 3 Inst. 202. Vide ante p. 130.*

Devastaverunt Bona Testatoris, is when the executors will deliver legacies, or make restitution for wrongs done by their testator, or pay his debts due upon contracts or specialties, whose days of payment are not yet come, &c. and keep not sufficient in their hands to discharge those debts upon record or specialties, which they are compellable by the law to satisfy in the first place; then they shall be constrained to pay these out of their own goods, according to the value of what they voluntarily delivered or paid.

Vide ante p. 132 & exinde.

And where a judgment recovered in the King's court shall be satisfied before a recognizance, &c. And if the ordinary have goods of the intestate by sequestration, and an action of debt to the value of the goods is brought against him; as ordinary he shall not dispose or administer these goods to any other, but is bound to satisfy the debt, for which action is first brought. *Termes del Ley.*

And judgments are to be paid before recognizances, statute-merchant or staple, for they are more puisne. *Vide Co. 4. Rep. 60. Case*

of the wardens, &c. of sadlers, and the *stat.* 34 & 36 E. 3. and 2 E. 6. concerning these matters.

Infant may administer at 17, but cannot commit *Devastavit* till his full age. 1 Vern. 328. His assent to a legacy good, if sufficient assent; *fecus not.* 1 Chan. Ca. 256.

Upon payment and satisfaction to an infant-executor, he may acquit and discharge, otherwise not; for if it should be good, it would be a *Devastavit*: But if a feme-covert be executrix she cannot release; for she may do nothing to the prejudice of her husband, but the release of the husband is good. *Coke's 5 Rep.* 27. *Russel's case.* *Co. Lit.* 172. *Vide ante p.* 217 & *post.* 53.

Vide ante p. 195.

If an executor promise to pay a debt of the testator's and have no assets in his hands at time of the promise, and if there be no debt, he may give the same in evidence, and probably have thereby remedy against his promise. *Coke's 9 Rep.* 94. *Will. Bane's case.*

Where it is fraud to pay part of money due upon a recognizance, and yet keep the recognizance in force, *vide Coke's 9 Rep.* *Meriel Tresham's case*, 108.

When judgment is given against executors, and the sheriff returneth *Nulla Bona*, &c. upon the *Scire facias*, the plaintiff may have a special writ of *Fieri facias*, *sil.* That the sheriff levy the debt of the goods of the dead, *Et. si sibi constare poterit*, that the executors have wasted the goods, then *de bonis propriis*. *Coke's 5 Rep.* 32. *Pettifer's case.*

Vide ante p. 40.

If there be three executors named in the testament, and two refuse, the third may prove the *will* alone, and yet the other two may meddle with the goods when they will, and either of them when they will: And if an action be brought, it ought to be brought in all their names notwithstanding such refusal. *Touchstone of precedents* 29.

If

If one executor be cited and refuse, yet he may afterwards administer at his pleasure; the like if more refuse: but if all refuse before the ordinary, and the ordinary commit administration to another, there they cannot afterwards administer. And the executor who proveth the *will* must name the other executors in all actions for debts, and they may release the whole debt; and they that refuse shall have an action by survivor. And in actions against them, all executors must be named, although the *will* be not proved. *Coke's 9 Rep. 37, 78. Hensloe's case. Infra p. 51.*

The probate of *wills* by common law belonging to temporal courts, and in some places in *England* the lords in their courts, as court-baron, or other courts have probate of *wills*; and the executors have a temporal right and interest by the *wills*, and the probate giveth them no right or title: but the judges are not willing to admit them to bring actions without shewing the *will* duly proved under seal of the ordinary: but the proving by one executor is sufficient for all. *Coke's 9 Rep. 34, 35, 36, 37, 38, 39, 40. Hensloe's case.*

Two executors prove the *will*, the third refuseth, yet he may release. *Coke's 5 Rep. 28. Middleton's case.*

The King may make his testament, as it was assented in full parliament; and the executors of *Hen. 4.* refusing, the archbishop of *Canterbury* was to grant administration of the same: and when the King is made executor, he doth appoint others to execute the same, (against whom such as have cause of suit may bring their action) and appointeth others to take the accompt. *Coke's 4 Inst. 335.*

At law if one had refused to sell, the others could not sell; but now by 21 H. 8. c. 4. tho' part of those to whom such power is devised refuse, the rest may sell; and so may such of those to whom land is devised to be sold, who are willing tho' the others refuse, by a favourable construction of that statute. Hawk. Abr. 170.

If a man devise that his executors may sell his land, here they have but a power or bare authority, and they must all join; and if one die, or refuse, the other cannot sell; but if a man devise lands to one for life, and after his decease that his land shall be sold by his executors, there it is otherwise, because they could not sell the land sooner; but there, if the executors were particularly named, then the survivors could not sell. But if a man devise his lands to his executors to be sold, there, as they have an interest or estate which doth survive, their power shall likewise survive, and the survivors may sell. *Coke's 1 Inst.* 112, 113.

If a man devise that his executors shall sell his land, there the land shall descend to the heir, and he shall take the profits in the mean time; but if a man deviseth his tenements to be sold by his executors, or his tenements to his executors to be sold, there the descent is taken from the heir, and the executor shall have the mean profits till sale, which shall not be assets in their hands; but therefore they are compellable to sell the lands so soon as possible. *Coke's 1 Inst.* 236. a. *Vide post.* 54.

If a copyholder surrenders his copyhold-lands to the use of his *will*, and afterwards by his *will* duly executed, doth order and direct that two persons, or the survivor of them, or the executors or administrators of such survivor shall make sale of such copyhold-lands, and apply and dispose of the moneys arising thereby, for the intents and purposes in his said *will* mentioned; they may sell the copyhold-lands without

without being admitted tenants thereof; and the lord shall admit the vendee, and shall have but one fine. *Holder on the demise of Sulyard, Esq; v. Preston, C. B. 2 Wilson, 400.*

In debt by executors, if one demandant or plaintiff be nonsuit, and the other sueth forward, he who is nonsuit shall not be amerced. *Coke's 8 Rep. 61. Beecher's case.*

The heir shall not have an action of debt upon an obligation, but the executors. *F. N. B. Eng. 266. in an obligation to one and his heirs.*

They may likewise bring action for arrear of an annuity in fee. *Ibid.*

Lessee of a manor for life dieth, his executors shall have debt for arrearages of the rent. *F. N. B. 290. Eng.*

They may have execution upon a statute. *F. N. B. 267. Eng.*

May bring a writ of covenant. *F. N. B. 323, 324. Eng. Covenant for a personal thing.*

A *Certiorari* lies to them to certify the conu-
sance of a fine. *F. N. B. 328. And an alias plu-
ries, and attachment against the judge's executors.*

An executor before probate may release an
action, (yet he can have no action) because the
right of action is not in him. *Coke's 1 Inst. 292. b.
Vide ante Wentw. p. 34.*

Where executors of a bishop shall have a ward
which fell in the life of the bishop, otherwise of
a presentation to a church which voided in his
life. *Coke's 1 Inst. 388.*

Where an infant at 17 makes the debtor his
executor, the debt is extinct. *Ibid. 264.*

For as the law
gives the infant
power to make an
executor, it gives
Hawk. 351.

his executor the same advantages with others.

Execu-

Executors.

Executors shall not have execution of the judgment, or recognizance, in the time of the testator within the year without suing a *Scire facias*; but otherwise it is of a statute, &c. *Coke's 2 Inst.* 395.

Where by statutes action of accompt lieth for executors, administrators, and executors of executors, *vide Coke's 2 Inst.* 404.

The heir or executors, according to the case, shall have a writ of error upon a bill of exception. *Coke's 2 Inst.* 427.

If parson or prebend dieth, his executors shall have an action of debt for arrearages incurred in the life of the testator: and the like if the parson or prebend resign, he shall have action for the arrearages of an annuity, because the person of him who is to pay the annuity is chargeable, but otherwise it is in case of a rent, be it rent-fervice, rent-charge, or rent-secke. *F.N.B.* 268. *Eng.*

If a woman be endowed of rent, or if rent be granted for life, and the tenant attorn, the rent is behind, and after the particular estate is determined by death, the executors of tenant in dower, or of the grantee for life shall have an action of debt by the common law, because by possibility the testator himself might have an action of debt; for if he had surrendered his estate to him in the reversion, he should have an action of debt for the arrearages incurred before. *Coke's 4 Rep.* 49, 50. *Oguel's case.*

If a man hath or shall have, in right of his wife, any estate in fee-simple, fee-tail, or for term of life, of or in any rents, or fee-farms, which shall be unpaid in the wife's life, the husband
after

after the decease of his wife, his executors or administrators, shall have action of debt for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors or administrators; and also my distrein for the same by force of the stat. 32 H. 8. cap. 37. *Coke's 4 Rep. 49, 50, 51. Andrew Ognel's case.*

In all cases where action is brought by one as executor, although it be for rent arrear, or other matter grown due in their time, yet the writ shall be in the *Detinet* only: but when an executor or administrator taketh the profits nothing shall be assets, but the profits above the rent reserved; and therefore in such case the writ shall be for rent in the *Debet & Detinet*. *Coke's 5 Rep. 31. Hargrave's case.* Vide ante p. 57.
147.

If executor bring an action as administrator, he may be barred as to the action of the writ: but yet mistaking of his action is no bar, nor estoppel to bring his true action. *Coke's 5 Rep. 33. Robinson's case.*

If a man by deed grant a rent for life, proviso that he shall not charge his person, this is a good proviso; yet if the rent be behind, and grantee die, his executors shall charge the person of the grantor in an action of debt, for otherwise they should be without remedy; and therefore it is now become repugnant, and by consequence void. *Coke's 6 Rep. 41. Sir Anthony Mildmay's case. Co. Lit. 146.*

If a man make lease *pur auter vie*, of land in two counties rendring rent, and the rent is behind, *& Cestuy que vie* dieth, the lessor shall have an action of debt in which of the counties he will, and so may his executors, for now it is changed into an action of debt; and in that case
no

no land shall be put in view, but the person of the debtor shall be only charged by the common law: And the like, if a rent be issuing out of land in two counties.

Executors shall have an action for rent behind against the grantor, and several feoffees, for the rent behind in each of their times. *Coke's 7 Rep. 39. Lillingston's Case.*

A Man professed
is dead in law.

If *A.* be bound to the abbot of *D.*; *A.* is professed a monk in the same abbey, and after is made abbot thereof; he shall have an action of debt against his own executors. *Coke's 1 Inst. 133. b.*

If the marriage
of the feme execu-
trix should be
a release, it would
be a devastavit
which an act in
law never works.

Where a feme executrix take the debtor to husband, notwithstanding the debt remains; if feme obligee take the debtor to husband, this is a release in law. The like if two femes obligees, and one take the obligor to husband. *Coke's 1 Inst 264. b.*

Action for an escape lieth not against the gaoler's executors, because it is a trespass. *2 Inst. 382. Vide ante, p. 127.*

If I deliver goods to one who is indebted to me, and he dies, against his executors I may have a writ for the goods, and for the debt; because that the writ is against the executor for the debt in the *detinet*, and for the detinue it is in the *detinet*: and therefore the writ well warrants the count to declare partly for debt, and partly for detinue; but such action he could not have had against the testator, because against him in debt the writ ought to have been in the *debet & detinet*. *Touchstone of Precedents 40.*

In case of an executor, though the plea be multiplied, or double, yet good; for one may answer to every thing alledged by him. *21, 22 Car. 2. Jefferys vers. Dod.*

If

If executor of lessee for years assign over his term, an action of debt doth not lie against him for rent due after the assignment; the like if the lessee assign over his interest and die: But if he assign but Part of the matter or land granted it is otherwise, and in some cases it shall be apportioned. *Coke's 3 Rep. 24. Walker's Case.*

Where he in remainder, and not the executor of tenant for life, shall be charged by distress for rent arrear in the life-time of tenant for life. *Coke's 5 Rep. 118. Edriche's Case.*

Where executors of a person outlawed may satisfy, and then take advantage of the king's pardon, but not before in the Case of a subject, where executors shall have attain, by Stat. 6 Ed. 6. Restitution upon Stat. 21 H. 8. Administrator shall have a Writ of Error upon stat. 27 Eliz. *Coke's 6 Rep. 80. Sir Edward Pbitton's Case. Vide ante, p. 101.*

In Replevin executor or others need not alledge seisin in making avowry for rent; for the deed is the title, and no seisin need be alledged, unless forced by an old statute of limitation. *Coke's 8 Rep. Sir William Foster's Case, 65.*

It is a maxim in law, that executors shall not be charged with a simple contract, nor with a debt for meat and drink of the testator, although it be of necessity. [and for which an infant shall be bound as for his necessarys,] Nor the executors of the Lord for surplusage of accompt before auditors; nor in an action upon the case upon *Assumpsit*, which is a personal action, and dieth with the person; because where the testator

Vide ante p.

May he charged in *Assumpsit*; for in *Assumpsit* no wager is allowed, so this paragraph is not law.

tator might have waged his law, no action lies against the executors. *Coke's 9 Rep. 87. Pinchon's Case.*

Vide ante p. 122.

But the lieutenant of the tower may bring his action against the executors of a prisoner for treason dying there, for the meat and drink provided for such prisoner. The like of any other gaoler; for the gaoler is bound to find meat and drink for his prisoner, and in such case the prisoner cannot wage his law. *Ibid.*

The like difference is between a labourer, and limner of books; for the labourer is compellable to serve, but the limner not; and therefore 'twas his fault he did not take a specialty upon his agreement. *Coke's 9 Rep. 88. Pinchon's Case.* But actions upon the case *sur Assumpsit* do well lie against executors. *Ibid. 90.*

Action of accoupt lies not against executors, but only for the King. *Coke's 1 Inst. 90. b. Coke's 11 Rep. Earl of Devon's Case.*

If a man make a lease for life to one, the remainder to his executors for 21 years, the term for years shall vest in him presently, for even as ancestor and heir are correlatives (*viz.*) one cannot be named without relation to the other as to the inheritance: as if an estate for life be made to *A.* the remainder to *B.* in tail, the remainder to the right heirs of *A.* The fee is vested in *A.* as it had been limited to him and his heirs; even so are the testators and executors *Correlativa* as to any chattel: and therefore if a lease for life to be to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors. *Coke's 1 Inst. 54. b. Vide hic ante p. 37.*

The

The executors do more actually represent the person of the testator, than the heir doth the ancestor; for if a man bindeth himself, his executors are bound, though they be not named; but so it is not of the heir; and so of administrator, and ordinary also. *Coke's 1 Inst. 209. a.*

And though the executor be not named, yet the law appoints him to receive money due or owing to the testator: but so doth not the law appoint the heir to receive the money unless he be named. *Coke's 1 Inst. 209. b. 210. a.*

If mortgage be to pay the money to the mortgagee, or his heirs, the mortgager cannot pay the money to the executors of the mortgagee: for the law will never seek out a person where the parties themselves have appointed one; *Et in hoc Casu Designatio unius Personæ est Exclusio alterius, & expressum facit cessare tacitum.* But if the condition be to pay money to the mortgagee, his heirs or executors, the mortgager hath election to pay it either to the heir or executors. *Coke's 1 Inst. 210. a.*

If feoffment be upon condition to pay money to the feoffor, or his heirs or assigns, at such a day, and before the day feoffor makes his executor and dies, the feoffee may pay the money either to the heir or executors, for they are his assigns in law as to this intent. But if a feoffment be made upon condition that if the feoffor pay to the feoffee his heirs or assigns 20*l.* before such a feast, and before the feast the feoffee maketh his executors and dieth, the feoffor ought to pay the money to the heir, and

Y

not

not to the executors, for the executors in this case are no assigns in law. *Coke's 1 Inst. 210. a.*

But if the feoffee make a feoffment over, the feoffor may pay the money either to the first feoffee, or to the second feoffee: and so if the feoffee dieth, he may pay it either to the heir of the first feoffee, or to the second feoffee. *Ibid.*

Executors have judgment in an accompt, and have the defendant in execution for arrearages: now the testament is annulled, for that the testator was an idiot, and the record spiritual was removed into the chancery by writ, and sent into the *King's Bench*, where the action was brought; and thereupon the defendant brought an *Audita Querela*; and adjudged it did well lie. *Coke's 8 Rep. 144 Dr. Drurie's Case. Dier. 203. b.*

The Lady *Pawlet*, tenant for life, made a lease for 99 years, if she lived so long, yielding 100 *l.* at the feasts of *St. Michael* and the *Annunciation*, or within forty days after; the lessee made his wife executrix and died, the Lady afterwards made her executor, and died the thirteenth day after *St. Michael*: her executor brought action for the rent due at *Michaelmas*; but the court was against the plaintiff. *Coke's 10 Rep. 129. William Clun's case.*

Vide ante p. 134.

Every executor is an administrator of goods, and the pleading is, *Ne unques Executor, Nec unques administravit come Executor.* And an administrator hath the office and quality of an executor. *Coke's 5 Rep. 83. Snelling's case.*

If an executor or administrator plead payment, or recovery of other debts in bar to an
 I action;

action; if it be by covin, it shall be no bar to a just debt. *Coke's 8 Rep. 133. Turner's case.*

The defendant pleads, Fully administred; the plaintiff replies, that he had assets; the jurors find assets to 172*l.* judgment to recover the whole debt of 200*l.* and costs and damages of the goods of the testator, if, &c. and if not, then damages of his own goods. *Coke's 8. Rep. 134. Mary Shipley's case.*

See 1 Lev. 286.
2 Saund. 214.
1 Sid. 448.
2 Keb. 606, 631,
666, 671.
1 Vent. 94.

Note: The plaintiff upon this bar might have prayed judgment presently, for thereby he confesseth the debt; but he cannot have execution till the defendant have goods of the deceased. *Ibid.*

An executor of his own wrong shall not retain, for thereof will ensue great inconvenience. *Coke's 5 Rep. 30. Coulter's case. Cro. El. 630.*

Vide plea p. 55
& ante 181.

When a man dieth intestate, and a stranger taketh his goods, or selleth them, in this case it maketh him executor of his own wrong; although the pleading be, he never was executor, or never administred as executor. *Vide ante p. 172.*

But when an executor is made, and he proveth the *will*, or taketh upon him the charge of the *will*, and administreth; in this case, if a stranger taketh any of the goods, or claimeth them for his proper goods, and useth and disposeth of them as his own goods, that doth not in construction of law make him an executor of his own wrong; because there is an executor of right whom he may charge, and these goods which are taken out of his possession after he has administred are assets in his hands. But although there be an executor or administrator, yet if a stranger take the goods, and

Executors.

claiming to be executor pay debts and receive debts, or pay legacies and intermeddle as executor; there, for such express administration as executor, he may be charged as executor of his own wrong, although there be another executor in right. And when a stranger taketh the goods before the rightful executor hath taken upon him, or proved the *will*, in this case he may be charged as executor of his own wrong; for the rightful executor shall not be charged but with the goods which come to his hands, after he hath taken upon him the charge of the *will*. *Coke's 5 Rep. 34. Read's case.*

If a man bail goods to another, and afterwards the bailor doth release to the bailee all actions, the bailee dieth; in a writ of detinue brought against the executors they shall not take advantage of this release, for the same determineth by the death of the bailee; and the action given against the executors is a new action (although of the same nature) grounded upon their own detainer. *Coke's 10 Rep. 51. Lampet's case.*

By *Assumpsit* of the testator to pay a debt, or duty, an action upon the case lieth against the executors. *Coke's 10 Rep. 77. Lovies's case.*

If any person by recommending an officer to the King, or otherwise, be a means or instrument of loss or damage to the king, he, his heirs, executors and administrators, shall be chargeable to the king for such damage sustained. *Coke's 11 Rep. 91, 92. Earl of Devonshire's case.*

Where

Where *Cestuy que use* shall charge the executors, &c. for profits received by the feoffees in trust in their life-time. *Coke's 4 Inst.* 86, 87.

One executor may refuse, and yet afterwards administer or release a debt, but otherwise it is if they all refuse before the ordinary: and probate of *wills* in the spiritual court before the ordinary hath been but of late times, &c. and they have not the same by the spiritual laws, but *Consuetudine Angliæ, & non de communi jure*. And after they have proved the testament their authority is executed, and they have not the power to take the refusal of any, when any of the executors prove the *will*. And much more concerning the power of the ordinary in probate of *wills*, granting administration, &c. and the statutes concerning the same, see in *Coke's 9 Rep.* 37, 38, 39, 40. *Hensloe's case. Supra p.* 39 *hic*, & *p.* 40 in *Wentw.*

By the common law executors could not have an action of accompt in respect of the privity of the accompt. But *Stat. Westm. 2. cap. 23.* giveth an action of accompt to executors; *Stat. 25 Ed. 3. cap. 5.* to executors of executors; and *Stat. 31 E. 3. cap. 11.* to administrators. Executors of the accomptant chargeable to the King by his prerogative in action of accompt; but 'tis otherwise in the case of a common person. *Vide Coke's 11 Rep. Earl of Devonshire's case.*

An executor is not chargeable in an accompt where he cannot be charged in detinue; for that nothing came to his hands; nor in accompt, where the testator was not bound to render ac-

W. 2. c. 23.
 23 Ed. 3. executors shall have a writ of accompt, and like action and process in the same writ as their testator should if he had lived. 25 Ed. 3. stat. 5. Executors of executors shall have actions of debt, accompt and of goods carried away of the first testators, and executors of statutes merchant and recognizance, made unto him, testator's goods, &c.

and also shall answer to others so far as they shall recover of the first testator's goods, &c. the first executors should have done 31 Ed. 3. c. 11. administrators to have an action to demand and recover, &c. and shall answer to others, &c. in the same manner as executors, &c.

compt, although to the King. *Vide Coke's 11 Rep. Earl of Devonshire's case.*

By 4 & 5 Ann,
c. 16. it is given.

It hath been attempted in parliament to give an action of accompt against the executors of a guardian in socage, but never could be effected. *Coke's 1 Inst. 90. B.*

In regard of the length of time, and the loss of books (which the defendant had sworn by his answer) it was ordered, the defendant should not be charged in the accompt for more than according to his own oath what was made, or he did remember or believe was made, by sale of those goods: for an accomptant having lost his papers by no fault of his own, shall not be charged beyond his own oath. Yet a surviving factor* was to accompt for what was made by himself or co-factor; and in some case an accompt lies against the executrix for the deceased factor, *Cases in Chancery 127, 128. Holst-com against Rivers.*

*See S. P. Godfrey v. Saunders, Easter, 10 Geo. 3. 3 Wilson in C. B.

In the case, *Stowel against Long*, executor to *George Long*, the Lord Keeper declared, that if the defendant's counsel had not offered to accompt he would not have ordered the defendant to accompt; for that all the money received by the profits was pardoned by the act of oblivion. *Cases in Chancery 173. George Stowel against Long, executor to Long.*

Plea of accompt stated, over-ruled, although the defendant was but an executor, and pleaded, that he knew not how to accompt; but this was upon full proof that 200*l.* was omitted in the accompt, being paid by his servant, and entered in his book, which he then had not. *27 Car. 2. Wright & Coxon, 1 Chan. Ca. 262. Nel. Chan. Rep. 431. S. P. 2 Chan. Ca. 157. S. P.*

Accompt.

Accompt lies not against executors or administrators, because they are not privy to the accompts; and a detinue lieth not for money numbred, because one penny may not be known from another; and the testator might not wage his law against a bill, being sealed and delivered as a deed.

By 4 & 5 Ann. c. 16 actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint tenant and tenant in common, his executors and administrators against the other, as bailiff for receiving more than his share, and against their executors and administrators; but generally matters of accompt are most proper in equity.

It is clear law, that no action of accompt lieth against an executor or administrator, for the law doth not intend them to be privies to the accompt.

Accompt lay not against executors for three causes. First, for want of privity, and for that he never was in possession of the land, nor took any profits of it, &c. *Dyer fol. 277. Pla. 59.*

In all actions brought by executors shall be summons and severance, because the best shall be taken for the benefit of the dead: and so in an action of trespass, as executor for goods taken out of their own possession; and the like accompt as executor. *Co. 1 Inst. 227.*

The release of an infant-executor, if he receive full payment or satisfaction, is a good discharge for what he receiveth, but it is otherwise without payment. *Co. Lit. 172.*

Vide hic. 38, ante p. 217.

But the release of feme-covert executrix is not good, for she can do nothing to the prejudice of the husband: but without question the release of the husband is good. *Co. Rep. lib. 5. Cases of executors, fo. 27.*

If executor do not sell, but refuse to make sale, he is bound to put all the profits of the land to the use of the dead. *Co. 1. Inst. 236. a.*

Assets in maines l'Executors, is when a man indebted makes executors, and leaves them suf-

Assets, what

ficient to pay, or some commodity or profit is come to them in right of their testator; this is called assets in their hands. *Termes del Ley. verb: Assets.*

If a man devise lands to his executors to be sold, and his meaning be, that they should take the profits in the mean time, then it is necessary that he deviseth that the mean profits till the sale should be assets in their hands, for otherwise they shall not be so; and it is better to give them an authority than an estate, unless in some cases. *Co. Lit. 236.*

Damages recovered by the executor in an action of trespass shall be assets, yet they were never in the testator, *Co. Lit. 124. Vide ante p. 69.*

Where the testator deviseth that his executors shall sell the land, there the lands descend in the mean time to the heir; and until the sale be made the heir may enter, and take the profits. But when the land is devised to his executor to be sold, there the devise taketh away the descent, and vested the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold; and in such case the executor is bound to sell so soon as he can; for that the mean profits taken before the sale shall not be assets, and therefore he may otherwise take advantage of his own laches. *Co. 1. Inst. fo. 236. sect. 383 Vide. hic ante 40.*

Jurors may find assets by descent in any other county in *England*, and jurors may find the

See *Holder v. Preston & Wilson* 400.

the substance of the issue, (that is to say) assets, and the finding that they are beyond sea is surplufage: For if the executors have goods of the testator's in any part of the world, they shall be charged in respect of them: But it is otherwise in felony and other criminal cases; for *Ubi quis delinquit ibi punietur*. Co. 6 Rep. 47. *Dowdale's case*.

Executor of his own wrong may not retain to pay himself, for then every creditor would contend for it; and it is not reasonable for any to take advantage of his own wrong. And the Law of God saith, *Non facias malum ut inde fiat bonum, & melius est omnia mala pati quam malo consentire*. Co. 5 Rep. fo. 30.

Vide hic ante
p. 49. & 181.
Cro. El. 630.
Ireland v. Couf-
ter.

If one hath lands for years as executor, and surrender the same, now to one respect the term is extinct, and to another respect it is in being. Co. 1 Rep. 87. *Corbel's case*.

Where the covenant to the testator was the cause of making the lease to the executors, for that cause the term was assets in the executor's hands. Co. 1 Rep. 98. *Shelley's case*.

Uses and confidences to some respects were reputed chattels, and so were devisable; and to other respects they were esteemed as hereditaments, of which there should be a *Possessio Fratris*. But yet in law, neither chattels nor hereditaments; for they were not assets to executors, or assets to the heir. Co. 1 Rep. 121. *Chudleigh's case*. Co. 8 Rep. 95. *Matt. Manning's case*.

When an executor or administrator taketh profits, nothing shall be assets but the clear profits. Co. 5 Rep. 31. *Hargrave's case*.

Goods

Executors.

Goods taken out of the possession of an executor after he hath administrated, are assets in his hands. *Co. 5 Rep. 34. Read's case.*

If executors plead Nothing in their hands, or heir Nothing *per discent*, if assets found, judgment shall be for the whole: But upon plea Nothing *per discent*, the plaintiff may have judgment presently, and a *Scire facias* when assets do descend. *Co. 8. Rep. 131. to 134. Mary Skipley's case.*

Where an executor or administrator ought in pleading to confess the debt, but that they have not assets, except to satisfy debts of record. *Coke's 9 Rep. 109. Merial Tresham's case.*

Where the executors of feoffees shall answer *Cestuy que Use* of profits received by the feoffee.

A term granted to use of a feme-sole, her executors and not her husband shall have the use. *Co. 4 Inst. 85, 86, 87.*

Adjudged that a term of 24 years limited to *Charles Paget* (after the death of *Lord Paget*, who had covenanted for discharge of funeral debts and legacies, he would stand seised to the use of *T. T.* during the life of *Lord Paget*, after to the use of *Charles Paget* for 24 years) was void, because it wanted a good consideration; forasmuch as *Charles Paget*, and others, were strangers to the considerations, *scil.* to the payment of his debts and legacies: But if he had made them executors, so that they had been chargeable to the payment of them, and so privy to the consideration, then the consideration had been good. And it was agreed, although the term was void *ab initio*, yet if the covenant had been (that after

ter the end or expiration of the said 24 years, he would stand seized to the use of the son (*ut supra*) that his son should not have the same till the years be incurred: but the words being after expiration, or end of the said term of 24 years, and the term imports in itself the estate and interest in the land; for this cause the term being void, the estate of the son shall begin presently. *Co. 1 Rep. 154. Rector of Chedington's case.*

If a man hath a bare authority accompanied with a trust, as executors have to sell lands, they cannot sell by attorney: But if a man hath absolute authority as owner of the land, as *Cestuy que use* heretofore had, then it is otherwise. *Vide Co. 9 Rep. 75. Combe's case.*

One executor may assign a term without the other, according to the opinion of the lord chief justice *Holt* in *Stonor's case. Vide ante, p. 98.*

The writ *de Rationabili parte Bonorum* lies for the wife against the executors of her husband after debts paid, and funeral expences discharged; and there must be a custom alledged in some county, &c. to enable the wife or children to the said writ; and so it hath been resolved by parliament, 3 *E. 3. Detinue* 156. 40 *E. 3. 38.* But such children as be reasonably advanced by the father in his life-time, with any part of his goods, shall have no further part of his goods; for the words of the writ be, *Nec in vita patris promoti fuerunt.* *Co. 1 Inst. 176. B.*

The wife of *Walter Pheasant*, who was an orphan, had her portion in the chamber of *London*, and after marriage, *Walter* took out 40 *l.* thereof, and by will gives his said wife her
portion

By the custom it is to be paid at the full age or marriage of the female orphan, and it was the laches of the husband he did not recover it; it was a Chose in Action, and not devisable, and Trover would not lie for it, &c. Per Cur. the injunction which was obtained to stay proceedings in the writ of dower was dissolved.

2 Vent. 340.
Mich. 22 Car. 2,
in Canc. Pheasant v. Pheasant & al'; & vide post 79.

portion in the chamber of *London*, being 2800 *l.* and other things to the value of 1000 *l.* on condition she renounce her dower: she accepts this legacy before, and after her husband's death, the executors of the husband exhibit their bill in chancery against the widow to renounce and release her dower; and the widow brought a cross bill against the executors of her husband, the mayor and commonalty, and chamberlain of *London*, for her portion in the chamber of *London*, and insisted that her portion belonged to her, in regard the security was unaltered by her husband in his life-time, and so was as much as if it were a debt due to her by bond, The Lord Keeper conceived this money in the chamber of *London* was a debt, for the chamber paid interest for it, and so the widow intitled to it; and the acceptance of a collateral satisfaction will not bar her dower, according to *Vernon's case*. *Cases in chancery* 181, 182, *Pheasant's case*.

In the case of *Civil* against *Rich*, the question was on a *will*, whereby, after other bequests, this clause was added: Item, *All the rest of my lands, goods, and personal estate, I give to A. B. on trust to give to my children and grandchildren according to their demerits*. The devisee who was heir and executor gave the land to one, omitting the rest; and the question was, if that was a disposition according to the trust. The lord chancellor said, I take it for a rule, That wheresoever there is a demand in law or equity, there must be a certainty of the thing demanded to be adjudged or decreed. I sit not here to make the *wills* of men, nor to interpret them further

further than the *wills* go; and therefore as to the settlement of the lands on one, and not on all, I cannot alter; and so dismissed the bill as to that. Another question arose touching the personal estate, wherein the point was, That a citizen of *London* being residuary legatee dying, whether this being but a legacy, which till election rested *prima facie* in the legatee, but as executor, should be subject to the custom as the executor's own estate: The lord chancellor decreed it should; and said, I will make election for him. *Modern cases in chancery* 309. *Civil against Rich.*

The *will* was good if executed, but could not compel an execution at law, therefore equity ought: And as to the pretence, that there was no person named in the *will* to sell, serjeant *Maynard* said, That when the intention is clear, all means without which that cannot be attained, must be supplied by a court of justice, and divers precedents were cited; as *Hughs* and others against *Collins*, *Lockton* against *Lockton* and others. Where lands were decreed to be sold, sometimes by the heir, sometimes by the executors, according to the intent of the party appearing, although no person appointed to sell. *Cases in chancery* 177.

The law always gives mortgage money to the executor where no person is named; and where the election to pay money either to the heir or executor is gone by the forfeiture in law, 'tis all one in equity as if either heir or executor were named; and then equity ought to follow the law, and give it to the executors: For in

And the money was originally parted with from the personal estate; for this vide 1 Chan. Ca. 283.
2 Chan. Ca. 50.
220.
2 Vent. 348, 351.
1 Chan. Rep. 242.
2 Chan. Rep. Co. Lit. 210.

155, 242. 1 Chan. Ca. 88. Hard. 467. 1 Vern. 170, 412.

natural

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natural justice and equity, the principal right of the mortgagee is to the money. *Cases in chancery* 285.

In an action against executors upon *Assumpsit* of the testator, the plaintiff need not aver, that the defendant hath assets to pay legacies or debts, for that shall come on the defendant's part; for the law intendeth that every one will in discharge of his conscience leave assets to pay all his debts, which he ought to pay to any one. *Co. 9 Rep. 87 to 90. Pinchon's case. Vide ante p. 157.*

He who maketh a promise to another, that if he will forbear to sue one, if he do not pay, he who promiseth will pay the money, shall be generally charged upon his own promise: So when one is executor, and maketh such a promise, the debt is due by him in right of his executorship, and the promise is made in his own right; and therefore he shall be charged in an action brought upon his *Assumpsit* generally, yet that money shall be allowed him in part of his account as executor. *Vide Co. 9 Rep. 94. William Bane's case.*

Note; it is at the plaintiff's election to bring his action of debt against the heir, or executors.

Actions personal,
what.

Actions personal, as such actions whereby a man claims debt, or goods, or chattels, or damage for them, or damages for wrong done to his person, and is that which in the civil law is called *Actio in personam*, and is brought against him who is bound by covenant or default to grant a thing. *Terms del Ley. verb. Actio personal.*

A

A man may join two or three things in his action, where the conclusion of his action is pertinent to the several matters, and doth not vary; as for goods, and debts against executors in the *Detinet*, &c. *Vide Touchstone of Precedents.*

Note, That the time, wherein he that is named executor in the testament is to deliberate and determine, whether he will accept or refuse the executorship, is left to the discretion of the ordinary, who not only within the year (allowed by the civil law) but within a month or two, may cite him to accept or refuse the office. *Swinb. part 6. sect. 4.*

When an executor intends to accept of the office, it behoves him to make an inventory of the testator's goods; for if he meddle with the goods, and refuse to make an inventory, he may be punished by the ordinary: But he may meddle with the goods as to the discharging of funerals, or disposing of such things as cannot be preserved, and kept until the time of making the inventory. *Swinb. part 6. sect. 6.*

Note, That the goods in the inventory ought to be particularly prized and valued according to reasonable prizes, and not huddled up together several things in a gross sum; but those goods which do belong to the heir after the testator's death, must not be put into the inventory; neither may those goods called *Bona Paraphernalia* (which is the wife's convenient apparel agreeable to her quality) be put into the inventory: But such is the general custom within the province of *York*, that widows are there not only tolerated to reserve to their own use their

Vide 4 & 5 W. & M. cap. 2. and 2 Ann. cap. 5.

their convenient apparel, and a convenient bed and furniture, but also a coffer or box, with divers things therein; as jewels, chains, borders, and other things necessary for their own persons. *Swinb. part 6. sect. 9.*

Certain jewels to the value of 500 marks were allowed to a viscountess as her *Paraphernalia*, and accounted but a reasonable allowance for one of her degree. *Viscountess Bindon's case More's Rep. pag. 72. Pl. 338.*

But note, If the rest of the goods will not suffice to pay the husband's debts, then are the wife's jewels, chains, borders, and such like, (being things of decency or ornament, but not necessity) to be put into the inventory amongst other goods of the deceased towards the payment of his debts. *Swinb. part 6. sect. 7. num. 5. in fn.*

In this case there were two judges against two. It was in trover on a special verdict for the jewels. Vide 2 Vern. 246. that he may devise them.

Note also, That the husband may devise such chains and jewels, &c. though he leave sufficient assets besides to pay his debts, and in such case the wife shall not have them as her *Paraphernalia*; but if the husband make no gift, or devise of them, and leave assets besides to pay his debts, then the wife in such case may keep them in despite of the executors or administrators. *Tr. 8 Car. 1. B. R. Lord Hastings and Sir Archibald Douglas's case, Cro. Car. 343.*

If any creditor or legatary do affirm, that more goods came to the executors hands than are named in the inventory, he must prove it; for otherwise credit is to be given to the inventory. *Swinb. part 6. sect. 10.*

If

If there be several executors, and one of them exhibits an inventory, this shall not charge the other in an action brought against them; but the party that sues must prove, that such executor hath actually administered, and that goods came to his hands, or else he shall not be charged. *Lent Assizes, apud Ebor. 8 Car. 1. Ireland's case, Clayton's Rep. p. 106. Pl. 179.*

More concerning inventories see in Wentworth's Office of Executors.

If a man be long absent, and it be not known whether he be alive or dead, if he have made a *will* it may be proved; especially if it be reported that he is dead, and that the party absent was sickly, and a very old man when he went away, or the like. *Swinb. part 6. sect. 13.*

As there are divers words which make a conditional disposition, so there are divers sorts and divisions of conditions, whereof some unnecessary, some impossible, some possible or indifferent: when the condition is extreme, that is to say, either unnecessary or impossible, such a condition hindreth not the executor or legatary, but that he may be admitted to the executorship, or recover the legacy, as if such condition had not been at all expressed. *Swinb. part 4. sect. 5. num. 4. and sect. 6. num. 2.*

But when the condition is not extreme, but indifferent or possible, then it must first be fulfilled before the executor be admitted, or the legatary recover his legacy; but there are di-

vers limitations to both these rules. *Swinb. part 4. sect. 6. num. 4.*

If the testator make *A. B.* his executor or give him 100*l.* when his son dies, here the executor or legatary cannot obtain the executorship or legacy till such a thing happen, but must wait the event of the condition. *Ibid.*

If the testator make *A. B.* his executor, or give him 100*l.* if he marries his, the testator's, daughter, supposing her to be living, whereas she is dead; in this case though the condition be impossible, yet because the testator did think her to be living, and therefore the condition possible, *A. B.* in this case cannot be executor, nor obtain the legacy; or if the daughter were living, but died before marriage, in such case it is all one; but if she were living, and afterwards did refuse to marry, yet notwithstanding *A. B.* might be admitted to the executorship, or obtain the legacy. *Swinb. part 4. sect. 6. num. 9, 14, 15.*

But if the testator's daughter were willing afterwards to marry with *A. B.* before he have obtained the executorship or legacy, and then he refuseth her; in this case he ought not to be admitted to the executorship, or obtain the legacy, unless after her refusal at first, and before her willingness, he be married to another woman, or have obtained the executorship or legacy, and is possessed thereof; for then her repentance comes too late. *Swinb. part 4. sect. 10.*

Also if the testator make *A. B.* his executor, or give him 100*l.* if he marry his daughter, and he refuses to marry her; here he cannot
be

be admitted to the executorship, or obtain the legacy, although afterwards he be willing to marry her, and then she will not marry him; unless that at such time when he refused he were not of sufficient age to marry: for his dissent at that time when he could not consent doth not hinder him, nor is it a breach of the condition. *Swinb. part 4. sect. 8.*

If one make *A. B.* his executor, or give him 100 *l.* if he erect a monument within three days after the testator's death: in this case, if the executor or legatory do perform the same with as much speed as is possible, it is sufficient though it was not done within three days. *Swinb. part 4. sect. 6. num. 11.*

If the testator shall charge his executor to whom he hath given all the residue of his goods, that he do some impossible act, or commit parricide, to pay then to *A. B.* 100 *l.* In this case he is not bound to the performance, for such legacy to *A. B.* is void. *See Swinb. part 4. sect. 6. num. 12.*

Where the testator makes an executor, or gives 100 *l.* if he pay 10 *l.* to *C. D.* before a certain time, within which time *C. D.* dieth; and then he payeth the 10 *l.* within the time to the executor or administrator of *C. D.* In this case, because he did not pay the 10 *l.* to *C. D.* himself, he cannot be executor, nor obtain the legacy. *See Swinb. part 4. sect. 7.*

But if I be made executor, or 100 *l.* is bequeathed to me, if I pay to the testator's son (being an infant) 10 *l.* In this case, if I pay it to the child's tutor, it is a sufficient performance of the condition. *Ibid.*

If the testator makes his wife executrix, or gives her 100 *l.* if she abideth with his children: in this case, if she enter into bond to perform the condition, or else to make restitution, she may then be admitted to the executorship, or obtain the legacy. *Swinb. part 4. sect. 9.*

Also if the testator make thee executor, or give thee 100 *l.* if thou never play at cards or dice, or if thou never wilt be bound for any person: in such case, entring into sufficient bonds to perform the condition, or else to make restitution, thou may'st then be admitted to the executorship, or obtain the legacy. *Vide ibid.*

Those conditions which do impugn and hinder that liberty, which every testator ought to have by the law in the making of his will, are accounted unlawful. Therefore if the testator makes thee his executor, or gives thee 100 *l.* if thou shalt make him thy executor, or give him 100 *l.* in thy testament; or if the testator makes thee executor, or gives thee 100 *l.* if *A. B.* will; or if the testator make such a person executor, or give him 100 *l.* whom thou wilt appoint: in these cases, though thou name one to be executor, or that *A. B.* will that thou be executor, or have the legacy; yet thou shalt not be admitted to the executorship, nor have the legacy, because by such means that free liberty which every testator ought to have in the making of his testament, might be taken from him, and he deprived of that privilege; therefore such dispositions are said to be captious. *Ibid. part 4. sect. 11.*

If

If the testator makes *A. B.* executor, or gives him 100 *l.* if he never marry, or if he marry according to the appointment or consent of some other person: the first of these conditions is unlawful, because it wholly forbids marriage; and the second is unlawful, because it is referred to another person to make choice for him, who perhaps may chuse such a person as is very unfit for *A. B.* to marry with. Therefore, in the first case, he may be admitted to the executorship, or obtain the legacy, as if no such condition had been; and, in the second case, *A. B.* may make choice of a woman himself (without the appointment of the other person) and marry her, and then he may be admitted to the executorship, or obtain the legacy, but not before marriage. *Ibid. sect. 12.*

By the civil law a devise on condition not to marry without consent, is void, though there be a limitation over; for there the maxim is *Matrimonium esse liberum*; but it is otherwise in our law, for such condition is good, and there shall be no relief, if there be a limitation over; otherwise it is if only in *terrorem*. But a devise not to marry at all, or not to marry one of such a profession, is void by our law.

- 1 Vern. 20.
- 1 Chan. Ca. 22.
- 2 Chan. Rep. 23.
- Nel Chan. Rep. 145.
- 2 Vern. 293.
- 2 Chan. Rep. 95.
- 2 Vern. 357.
- See 1 Wilton 130, 135 & 3 Atk. 330, 364. touching devises upon condition, and in *Terrorem*.

But if the testator make an executor, or give him 100 *l.* if he do not marry before the age of 21 years; or if that he do not marry a widow, or such a woman; or that he do not marry in such a place, or city: in these cases, if he do break the condition, then he loseth all his interest as to the executorship or legacy. *Swinb. part 4. sect. 12.*

If the testator make his wife executrix, and if she will not or cannot be executrix, then he maketh his son executor; and if his son be not executor, then he maketh his sister executrix; and if she be not executrix, then he maketh his brother executor: in this case, the testator is said to make degrees of executors; and in this example there are four degrees of executors. And observe always, the executor in the first degree

(as the wife is here) is said to be *instituted*, and the rest *substituted*. *Swinb. part 4. sect. 19.*

Note, That it is lawful for the testator to make as many degrees of executors as he pleaseth, and he may substitute into the place of one executor either one or more; and into the place of many executors he may substitute one alone, or he may substitute to every executor one, or one of them to another. *Swinb. part. 4. sect. 19.*

But if the testator do institute divers executors, substituting one or more to them, so long as any of them which was first instituted may be executor, the substitute is not to be admitted, unless the testator do appoint to every such executor a substitute; for then any one of these first instituted executors, not being able or refusing to be executor, his substitute is then to be admitted with the rest of the executors first instituted; whereas otherwise, any of the first instituted executors, in the first degree, lawfully undertaking the executorship, all the substitutes are excluded; and, in such case, if the executor afterwards die intestate, then the administration is to be committed of the rest of the goods of the testator deceased, not administered by the executor, except in some special cases. *Swinb. part 4. sect, 19.*

If the testator make one executor, if he give 10*l.* to *A. B.* and if he do not, then he appointeth another to be executor; though the first refuse to give 10*l.* to *A. B.* yet cannot the other be executor, unless he give the 10*l.* to *A. B.* because this condition of giving expressed

pressed in the institution, is understood to be repeated in the substitution. *Swinb. ibid.*

As to the appointing of tutors, it matters not by what form of words they are appointed, so that the testator's meaning can but appear; nor in what language the tutor is assigned, whether in *English, Latin, Greek, &c.* and it is the custom in several places, that if the father appoint not a tutor by his *will* to his children, then the mother by her *will* may appoint one and if neither father nor mother appoint one; then a stranger (if he make the child his executor) may appoint one; and if there be no tutor testamentary, then the ordinary may appoint one. *Swinb. part. 3. sect. 9. 12.*

It was the custom of many places formerly, that a boy after he had accomplished the age of fourteen years, and a girl after she had accomplished the age of twelve years, might then chuse their own tutors if they pleased, and refuse the tutors appointed them by their father's *will*: but now by the Stat. of 12 *Car. 2. cap. 24.* every father, whether they be of the age of 21 years, or under, may by deed executed in his life-time, or by his last *will* and testament in writing, delivered in the presence of two or more credible witnesses, dispose of his children, under the age of 21 years, and not married at the time of his death, for and during such time as they shall remain under the age of 21 years, or any lesser time, to the custody and tuition of any person or persons in possession or remainder, (popish recusants excepted); and such disposition of such children, since the 24th of *February 1645,*

or hereafter to be made, shall be good against all and every person and persons claiming any such child or children, as guardian in socage, or otherwise. *Ibid.* 11 & 12 *Car.* 2. *cap.* 24.

And such person, to whom such children shall be disposed, or devised, may have an action of ravishment of ward or trespass against such person as shall wrongfully take away, or detain such child or children, for the recovery of them, and recover damages for the same in such actions, for the use of such child or children; and they are also impowered by the same act of parliament, to take into their custody, to the use of such child or children, the profits of all the lands tenements and hereditaments, of such child or children, and the custody and management of their goods, chattels, and personal estate, until the age of 21 years, or less time, according to the parents disposition; and may bring an action in pursuance thereof, as by the law guardian in socage might do. 12 *Car.* 2. *cap.* 24.

Note, That there is a general custom within the province of *York*, and in several other places that there is due to the lawful children of every man, being an inhabitant or householder within the same province (and dying there or elsewhere) a filial or child's part and portion, which is sometimes a third-part, and sometimes an half-part of the father's clear moveable goods, as hath been afore-shewed, unless the child be heir to his father, or were advanced by him in his life-time. Upon which exceptions there are made these observations: as if the father should by his last *will* and testament forbid his child

to have any portion of his goods, such *will* in such cases is void, and the child may notwithstanding recover his filial part or portion: also, if the father should leave his child but 20*l.* when by the rate of the inventory his part comes to 100*l.* here he might refuse the legacy, and recover his full portion notwithstanding the *will*: or if the father should impose any condition upon the said portion, as to be paid seven years after his death, or the like; yet the child may sue for it presently after his father's death, and recover it before the seven years be out: for it is presently due upon the father's death, notwithstanding his father's *will* to the contrary; and if the father by his *will* should bequeath the portion after the child's death to any other person, in such case the *will* is void, and the portion shall go to the executors or administrators of the child after his death. But now by Stat. 4 & 5 *W. & M. cap. 2.* from and after the 26th day of *March* 1693, persons inhabiting, or who shall have any goods within the province of *York*, may by their last *wills* dispose of all their personal estate as they shall think fit; and their widows, children, and other kindred; shall be barred to claim any part of the personal estate in other manner than as by their *wills* shall be appointed. This act shall not extend to the cities of *York* and *Chester*, who are or shall be freemen of the said cities, inhabiting within the same, or the suburbs therefore at the time of their death. See Stat. 4 & 5 *W. & M. cap. 2.* But by 2 *Ann. cap. 5.* It is extended to the City of *York*.
 Also

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Alto by *Stat. 7 & 8. W. 3. cap. 38*, after the 24th of *June* 1696, it shall be lawful for any persons inhabiting or residing, or who shall have any goods and chattels within the principality of *Wales*, or marches thereof, by their last *wills* and testaments, to give, bequeath, and dispose of their goods and chattels, debts and personal estate, to their executors, or to such other persons as the testator shall think fit, as by the laws and statutes of this realm may be done within any other part of the province of *Canterbury*, or elsewhere. And after the said 24th day of *June*, the widows and children, and other the kindred of such testators, shall be barred to claim any part of the goods and personal estate of such testators, otherwise than as by the said *wills* is limited and appointed; any law custom, or usage to the contrary notwithstanding.

Provided, nothing in this act shall extend to take away any right or title which any woman now married, or younger children now born, may have to the reasonable part of their husband's or father's estate, by the custom or usage in *Wales*. See the *Stat. 7 & 8 W. 3. cap. 38*.

If tenant for life have hops growing, and die a little before the severance of them, in this case the executors or administrators shall have them, and not he in reversion or remainder; for the hops are accounted as emblements, they growing by manurance and industry of the owner, by the making of hills and setting of poles. *Cro. 1 part, fol. 396. Vide ante p. 58.*

As

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As to the payment of debts by the executor, he must have a care to pay them according to the following rules; otherwise it may be he shall be forced to pay some of the testator's debts out of his own proper goods, if there be not sufficient goods of the testator's to pay all the debts.

Vide ante hic
37, & ante 132.
to 156.

First, Funeral expences; then debts to the King or Queen's majesty; then judgments must be paid; after them statutes-merchant and recognizances; then obligations; and if there be divers obligations, he may pay which of them he pleases first; unless the day of payment in one obligation be past, and the day of payment in the other obligation not come; for then that is to be paid first where the day of payment is past; or unless one obligation be put in suit, and the other not; for then that in suit must be first paid: And if there be two obligations put in suit by two creditors against the executor, then he which first gets judgment must first be paid; and in this case the executor, if he will, may suffer judgment in that which was last put in suit, and so pay him off first; then, after these obligations, simple bills are to be paid; then rents in arrear by the testator; then servants and head-workmen's wages; then merchants-books; and lastly, contracts by word, in which the testator could not wage his law, upon which the executor may be sued in an action upon the case, upon the promise of the testator. *Co. 2 Inst. 32. Co. 3. Inst. 202. Co. 4 Rep. Harrison's case. Co. 5 Rep. 28. Co. 9 Rep. 86.*

Decree equal to
judgment.

An

Vide ante
Wentw. 36.

An executor may refuse the executorship, but he cannot assign it, but his refusal cannot be verbally, but by some act entered in the spiritual court, but there is not any certain form of renunciation; but if the meaning and intention of the renouncer appeareth it is sufficient, without the formal words of renunciation, as *Ego dico me nolle esse hæredem*; and so it was in Sir *H. Goodier's case*, 1 Leon. p. 135. Sir *Nich. Bacon* lord chancellor, Sir *Robert Catlin* lord chief justice, justice *Southcote*, and *Gerrard*, attorney general, were made executors to Sir *R. R.* they sent their letter to the chief officer of the prerogative court; whereas their business was so great they could not attend the execution of the will; and prayed him to grant letters of administration to *H. G.* and an entry was made in the court: *Executores testamenti prædicti executionem inde super se assumere distulerant, &c.* And it was held that the renunciation was good, and the entry thereof good. *Cr. El.* 92. *Mesme case.* *Hill.* 30 *El.* *Broker v. Charter.*

Note; The value upon the appraisement of goods is not binding, nor much respected at common law; if it be too high, it shall not prejudice the executor; if too low, it shall not advantage him, but the value found by the jury upon *Plene administravit* is binding. *Vide Raymond* 470, 471.

If the executor dies before probate, it is in law a dying intestate. *Hetley* 115. *Vide infra.*

Resolved, That before the probate, *Crew*, executor of *Clark*, a creditor of *Staley*, goldsmith, might arrest *Staley* for a debt due to *Clark*; and also before probate, *Crew* might have released *Staley* of such debt due to *Clark*,
but

but *Crew* could not declare against *Staley* for such debt, until he had proved *Clark's* will. *Raymond* 479, 481, *The Lady Chester's case*, by *Hale* chief justice. *Vide ante hic* 41. *Wentw.* 33.

A. is made executor, and makes his will, and makes *C.* his executor, who dies before the probate of *A.'s* will. In this case *C.* dies intestate, *quoad* being executor to *A.* and his executor cannot be executor to *A.* but there must be administration *De bonis non.* *Cro. Jac.* 614. *Hayton & Wolf*, 19 *Jac. termino Pasc'.*

Where husband and wife are divorced for her adultery, his release after, of any debt or duty due to the wife before marriage or after, is good against her and her executor; but after they are divorced from the bond of marriage, such release made after is void. *Rolls.* 343.

Having spoken before concerning assets, it will not be improper to set down some general rules as to assets. Ante p. 64.
Wentw. 1. Debts due to the testator, be it by bond, statute, judgment, or arrears of rent, are not assets to charge the executor until receipt of them; so all goods and chattels in action or possibility. *Godb.* 30. 2. Whatsoever the executor or administrator must be forced to sue for, by the name of executor or administrator, it being recovered shall be assets. Ante 99. 3. Assets in the hands of one executor, shall be said to be assets in the hands of all the executors. *Keil.* 51. 4. Assets in any part of the world, shall be said to be assets in every part of the world. So in debt against an executor; defendant pleads *Plene administravit*; issue was upon assets. The jury found that he administered, and had assets in *Ireland*; and adjudged that they were assets

Richardson v.
Dowell, executor
of Lany, Mich.
2 Jac.
Cro, Jac. 55.

assets here; and when they found he had assets, that is sufficient, and further to say in *Ireland* is idle. *Cro. Jac. 55. Richardson and Dowell. 6 Rep. 47. 5 Rep. 34. Dyer 392.* 5. Nothing regularly shall be said to be chattels going to the executors or administrators as assets, but what may be attached in an assize, or distrained for rent, or forfeited by outlawry. 6. It is not requisite that every asset be a thing in possession, or in the hands of the testator; for a thing may be assets which never was in the testator's hands; if those things come in lieu of the thing which was in the hands of the testator, as money for land, or other goods sold; or if they come by reason of another thing which was in the hands of the testator as executor of goods by merchandizing with the goods of the testator. *Godb. 30.* So a lease to *A.* for life, remainder to his executors for 21 years, this term is assets. 7. Albeit a thing be extinct and gone, as to the executor and administrator himself, yet it may have its being and be accounted assets, as to creditors and legatees; as executor that hath a lease in right of the testator purchases the fee, the term is drowned, and yet it shall have continuance and be assets for that purpose. So if debtor make the debtee executor; so if one have lands for years, as executor, and surrender the same. *1 Rep. 87. b.* 8. The goods and chattels of other men in the hands of the executors that were in the possession of the testator, and he had no right to them, shall not be assets; as if executor recovers a rent that belongs to the heir, it shall not be assets; if the testator were outlawed at the time
of

of his death, his goods are not assets, for they were none of his ; but after reversal of the outlawry they are.

Note, That suits in chancery are admitted for distribution of the surplusage of intestate's personal estates, (after the funeral expences, debts and legacies, are fully satisfied) upon the statutes of 22 & 23 Car. 2. c. 10. 2 Vent. 362. 35 & 36 Car. 2.

A. deviseth his land of inheritance in fee to his executors, and their heirs, not naming the executors by their names, and he makes *M.* and *N.* his executors, though they refuse to administer or prove the *will*, yet they shall take the land as joint-tenants in fee ; for executors is a good name of purchase as well as right heirs. *Moore* 806.

A. seised of land in fee, levies a fine of it to the use of himself for life, remainder to his executors till they have levied 300 *l.* out of the profits. *A.* dies, his executors suffer a stranger to hold the land, and to receive above 300 *l.* out of the profits, and after the executors of *A.* enter and lease the land for years. This lease is void, for the executors estate was determined by their negligence, and the words (in the deed declaring the uses of the fine) till they have levied 300 ; shall be expounded, as if the words were, till they might conveniently have levied the same. *Moore* 721.

It is said, that no action will lie against an executor for costs given in chancery, against the deceased in a suit there. *Godb.* 165. For it is lost when the party dies.

Adjudged for defendant on demurrer.

Debt lies not against an administrator upon an arbitrement made between the plaintiff and the intestate in writing, because the intestate might have waged his law. 39 & 40 *El. Bowyer v. Garland, Cro. El.* 600.

Mich. 7 Jac. the question was on the statute 4 Jac. cap. 3. But here he sued in another's right, and of matter which lay not in his conscience.

Executor brought debt upon an obligation, defendant pleads *Non est factum*; and found for the defendant; yet the plaintiff shall not pay costs. *Cro. Jac.* 229. *Haywarth v. Davie.*

Defendant pleads the plaintiffs were not executors, and it was so found, and yet he shall not have costs, 1 *Brownl.* 29.

But *D.* as executor brought trespass, and counts of his own possession, plaintiff was non-suit; the defendant shall have costs upon the Stat. 23 *H.* 8. *Noy, p.* 64. *Lady Digbey's case*

The heir being forced to pay the debt of his ancestor on bond, shall be reimbursed by the executors as far as there is personal assets. *Cases in chancery* 74. *Armitage against Metcalf,* 1 *Chan. Ca.* 74. *Pas.* 18 *Car.* 2. 2 *Chan. Ca.* 5.

The delivery up of a bond by the executor, and taking a new bond to himself for the debt, is no conversion in equity to charge the executor with the payment of that money, though it is in law. But the executor was decreed to assign the security to the heir, *Cases in chancery* 74. *Ibid.*

The overplus of the profits of a term devised out of an inheritance in trust to pay debts to executor, who is also residuary legatee, belongs to the executor, and not to the heir, it being a term, and passeth as an interest. *Cases in chancery* 98. *Gore against Blake.*

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Executor, who was suggested to have wasted the estate, decreed to give security for a legacy. *Ibid.* 121. *Duncomb, an infant, against executor of Stint, Hill. 2 Car. 2*

Payable at 21
years of age.

A lease renewed by an executor shall be liable to a legacy of the testator's. *Cases in Chancery* 191. *Holt against Holt.*

Legatee of a term sues, and the executor no party, not good, though it is charged that the executor hath assented. 1 *Cases in Chancery* 277. *More against Blagrove.*

Debtor executor to the testator decreed to pay to the devisee of the residue of the estate, tho' it was objected, that the case was different from former precedents, *Cases in Chancery* 292. *Phillips against Phillips.*

Infant's estate in the guardian's hands ought to be applied to the payment of his debts. *Cases in Chancery* 157. *Bridget Dennis by her committee against Sir Thomas Badd, and others.*

Assent of an infant-executor to a legacy not good, if there be not other assets for debts. *Cases in Chancery* 257. *Chamberlain against Chamberlain and others. Vide hic ante p. 53 & 38. & Wentw. p. 217.*

If there be no defect of assets in the executors hands, the heir shall have the mortgage money. *Cases in Chancery* 285. *Thornborough against Baker and others.*

The portion of an orphan in *London* is of such a nature, that if the husband die, his widow and not his executor shall have it. *Cases in Chancery* 182. *Pheasant against Pheasant. Vide hic ante, p. 58.*

Where and how executors and administrators, and executors of executors, shall be charged,

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and

and what actions they may have. *Vide Wing' Abr. Title Executors.*

The executors or administrators are chargeable to the King's debt, if they have assets; the like of the heir, although not named in the recognizance, &c. *Wing' Abr. Title Court.*

The King's debtor dying, the king shall be served before the executors. *See Magna Charta, 9 H. 3. See 27 Eliz. 3.*

No action against an executor to charge him on a special promise to answer damages out of his own estate, unless a note thereof be in writing, signed by the party, or some by him authorized. *Stat. 29 Car. 2. sect. 4.*

The Stat. 9 W. 3. 11. shall not alter the laws as to executors or administrators, in such cases where they were not liable to pay costs of suit.

If in court of record the plaintiff die after interlocutory judgment, and before final judgment, the action shall not abate, if the said action might be originally prosecuted by his executors or administrators. The like of the defendant. *Stat. 9 W. 3. 11.*

In actions upon bond, or penal-sum, for non-performance of covenants, the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess damages for such as he shall prove broken, and the like judgment shall be entered for the same as hath been usual. And if the defendant before execution executed, shall pay such damages and costs, a stay of execution shall be entered upon the record; or if by execution executed the plaintiff shall be fully satisfied the damages and costs with reasonable

able charges, the body, lands and goods of the defendant shall be discharged, and satisfaction entered upon record: yet the judgment shall stand as a further security to answer the plaintiff, his executors, &c. for further breach of covenants in the same deed or writing contained, upon which the plaintiff, &c. may have *Scire facias* upon the said judgment against the defendant, his heir, terre-tenants, executors, &c. upon which shall be like proceedings as before, &c. *Stat. 8 & 9 W. 3. 11.*

Cestuy que use declared by his will, that J. S. should have as well the governing and ordering of his children, as the disposing, letting, setting and ordering of his lands: whether J. S. might sell the lands by these words was the question. By the opinion of the court he might not; forasmuch as the meaning of the deviser might be collected, that he would that his lands should be disposed and ordered according to good order, and for the benefit of his children. But it should be ill ordered to sell the lands of the children. *Per Fitzb. Dyer 26. Pl. 170.*

A man possessed of divers dead chattels made two executors, and one of them got the goods, and disposed by discretion divers sums of his own proper money *in piis usibus & operibus charitatis*; as in payment of taxes for a poor town, and in reparations of the church, &c. Which sums amounted to more, or as much as the value of the chattels; to the intent to retain the goods of the testator as his own proper goods, and died possessed of the said goods, and made

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executors. And after his death the goods came to the hands of his executors, against whom the surviving executor brought an action of detinue for the goods aforesaid. And the defendants pleaded these payments and disposition of their testator, and the conversion of the property as above, and justified the detainer as the proper goods of the testator, for execution of the testament, &c. And it was taken for a good plea; and issue taken that the chattels were of greater value than the sums above. *Dyer* 187. *Pl.* 6.

It was agreed for law, that if a man hath goods to the value of 100 *l.* and is indebted 20 *l.* and he devised to his wife the moiety of all his goods, to be equally divided betwixt her and his executors, and the executors pay the debt, the wife shall have the moiety of all the goods; that is to say, to the value of 50 *l.* without any defalcation for the debt, so as the executors have assets: but satisfaction or sale of any parcel of the goods by the executors is good enough, and shall take away the division of the wife in that parcel. *Dyer* 164. *Pl.* 57.

A wife, executrix of the first husband, shall have the goods of the first husband, and not the executors of the second husband, if he made no gift of them in his life-time.

Where the testator did give and bequeath to one of the executors (all debts and legacies paid) the residue of his goods to have to his proper use, it was good to him only. *Dyer* 331. *Pl.* 21.

Where

Where nothing passeth without election, there the election ought to be in the life of the parties, and the heirs or executors cannot make election: but where an estate passes immediately, there the party, his heirs or executors, may make election *when* they will. *Co. 1 Inst. 145. a.*

The grantee of an annuity dies, his executors shall have action against the grantor for the arrears, because they can have no other remedy; for distrein they cannot, for the estate in the rent is determined. *Co. 1 Inst. 146.*

It is lawful for the executors to redeem the pledges of their testator with their own proper goods, when they have not any proper goods of the testator. And although they have goods which were the testator's, yet peradventure they have not money which was their testator's; and he who hath the goods in pledge will not receive goods for money: and so if one to whom the testator was indebted, will not receive goods in recompence, then it is lawful for the executors to pay him with their own money, and retain so much of the goods of the testator; for it may be, that there may be a penalty, which will be forfeit before they can sell the goods of the testator. And also it is reason, that a man should have recompence for what he hath lawfully paid. *Dyer 2 Pl. 6, 7.*

There is a rule, that if debt be recovered against executors, who have nothing more than the debt recovered, and before executors they are impleaded by another, and suffer a recovery and execution thereupon, they shall be charged

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of their own proper goods to the first plaintiff; for that they might have pleaded the first recovery; for the judgment in that case is, *Quod quer' recuperet debitum de bonis testatoris, &c.* So the goods are charged thereby, *&c. Dyer 80. Pl. 53.*

Scire facias against executors, with *Fieri facias* for to levy the debt and damages of the goods of the testator, *Si tant, &c. Et si non, tunc* damages of his own proper goods; the sheriff returned, that the executor had not goods; to satisfy the debt, but that he had levied the damages of the goods of the testator, upon which issued another *Fieri Facias*, surmising, that the defendant had wasted the goods of the testator; upon which the sheriff returned, that he had wasted the goods, and this was traversed and tried, and a verdict for the plaintiff: and upon motion in arrest of judgment it was staid *per tot' Cur'*: for the return upon the first writ was ill; for the goods of the testator ought to be charged with the debt, and not with the damages, if they were not sufficient to satisfy both, but the damages are to be levied of the goods of the executor, for the delay; and although that the trial and verdict be upon the return of the second writ, and the first admitted good and accepted by the plaintiff, and it is for the advantage of the defendant to have his costs levied of the goods of the testator; yet all the proceeding on the second writ, being founded upon the return of the first, which is ill, all is ill; and by the whole court the judgment was stay'd. *Levinz 1 part 7. Herne versus* —

In ejectment and in evidence to the jury at the bar, the case was, That a man possessed of a long term for years, devised it to his wife for life, remainder to trustees for his son for life, remainder in trust for the heirs of the body of the son, remainder to the right heirs of the son, and made his wife executrix. *Per Cur'*; The wife took the whole term as executrix in the first place, till she agreed to the devise; but it being proved that she said, that she would take the term according to the will; *per Cur'*, it was an assent sufficient; and a case was cited where, in the like case, the wife said, that the son was to have the estate after her; it was resolved, a good assent. But then the original lease could not be produced, but being an ancient lease the grandson of the lessor producing a counterpart found among the other evidences of his grandfather, it was allowed for evidence, although that no witnesses were subscribed to it: for *Wyndam* justice said, he had seen many deeds of the time of the reign of Queen *Elizabeth* without witnesses; then the title being made to the term by one as administrator, and no letters of administration produced, the book of ecclesiastical court where it was granted being produced, in which was entered the act or order of the court for the granting of it, it was allowed good evidence. *Levinz 1 part 25. Garret v. Lister.*

Vide ante p. 225.

Debt against an executor, who pleaded a judgment, and that he had not any goods except what are not sufficient to satisfy the judgment; upon which the plaintiff demurred, especially

All the pleas in Coke's Entries here cited are, Non habet, &c. bona & catalla, &c. præterquam bona & catalla,

quæ non attingunt ad valentiam præd. 300l. &c. or to that effect, not mentioning any sum in their hands.

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because

because he did not shew what value the goods are which he hath ; and now *Jones* argued, that it is ill in substance, for that upon general demurrer, as *Tresham's* case is *Co. 9.* and if it be no other than form, as *Moore* and *Andrew's* case is, *Hob. 133.* yet being specially demurred on is ill. *Cur'* ; It is no other than form. *Co. Entries 146, 148, 149, 152, 269, 617. B.* But being specially demurred on is ill. *Levinz. 1 part 132. Davies v. Davies.*

Error of a judgment in debt upon a judgment in the common pleas, where the plaintiff declared in the *Debet* and *Detinet* against an executor, and declared of a *Devastavit*, and had judgment *De bonis propriis*, and the judgment affirmed in *Banco Regis* ; and in other like cases hath been the like judgment. But between *Ent.* and *Withers, Mich. 29 Car. 2. B. R.* in debt upon an obligation, and count of *Devastavit* against an executor in the *Debet* and *Detinet*, it was ruled by judgment for the defendant ; for the court would not allow the action over which had been before ; *scil.* In debt upon judgment ; and so held the court before in the time of *Hale* in the case of one *Horsey* and *Daniel.* *Levinz 1 part 147. Cory v. Thinne.*

Debt against an executor, who pleaded that *J. S.* is co-executor with him not named in the writ, judgment of the writ, but doth not aver that the other had administered ; upon which the plaintiff demurred, and the plea was adjudged ill : for although when an executor sueth, the defendant may plead another executor not named, without shewing that the other hath administered, for he may not know whether he hath administered or not ; yet when an executor is sued, if

he pleads another executor not named, he ought moreover to say that he hath administered, for that lieth in his knowledge. *Levinz* 1 part 161. *Swallow v. Emberson*. *Vide ante*, p. 95. and 2 *Stra.* 1220.

Covenant against an executor upon the covenant of the testator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved in an arrest of the judgment, that this covenant was personal to the testator, and did not oblige the executors, but only obliged the master during his life to teach the apprentice; but *per Cur'*; It obliged the executors also, and they ought to see the apprentice taught his trade; and if they be not of the trade, they ought to assign him to another that is of the trade, so that he may be taught according to the covenant; and judgment was given for the plaintiff, *Levinz* 1 part 177. *Walker v. Hull*. †

Error in the exchequer chamber, upon a judgment in *B. R.* a man having a judgment made a man of full age and two infants his executors; he of full age proved the *will*, and alone brought the *Scire facias*, setting forth the truth of the case, and had judgment, of which error was brought and assigned, that all ought to have joined in the *Scire facias*: but by all the justices, upon advice with the civilians, it was not error; for the others may not prove the *will* during their nonage, and the judgment was affirmed, for the execution of the judgment shall not be delayed till the infant become of full age.

† The case of *Walker v. Hull* 1 Lev. 177 is denied to be law, in the case of *Baxter v. Burfield*. 2 *Stra.* 1266, 1267,
Nota,

Nota, Trin. 31 Car. 2 B. R. Rot. 1217. inter Coleborn v. Right. The executor of full age only, who had proved the *will*, brought action of debt for arrears of rent, and this case was cited and judgment for the plaintiff. *Levinz 1 part 181. Hatton v. Maskal.*

Assumpsit against executors upon a promise by the testator, who pleaded *Non Assumpsit*, upon which a verdict and judgment for the plaintiff; and error assigned, that it doth not appear by the plea [that the testator] *Non Assumpsit*; for it is not pleaded, That the testator; *Non Assumpsit. Cur' contra.* It shall be intended the testator; for there is not any charge of any assumption by the executor, but the testator only, and *Latch 125. Baker's case* was cited, where in debt against executors upon the testator's bond, and plea, *Non est factum*, adjudged *suum* should be intended of the testator, and the judgment affirmed. *Levinz 1 part 184. Browning v. Litton.*

Indebit' Assumpsit against an executor for divers merchandizes sold and delivered to the testator, the defendant pleaded several judgments in actions of debt specified due by the testator upon simple contract, obligations against himself *per Non sum Informat' prout patet per separalia recorda inde*, which are yet in force, and that he hath not assets above such a sum, which is not sufficient to satisfy the judgments, and that he stood charged with them; upon which the plaintiff demurred; and the case was argued at the bar several times, and then judgment was given by the whole court for the † plaintiff;

† N. Judgment seems to have been given for the defendant, and this word, [plaintiff] seems to be a mistake in Levinz's Report.

and two exceptions where taken to the pleading.

1. To the conclusion. *Prout patet per separalia recorda inde*, to the said several judgments, where such conclusion ought to have been. to each severally; and as it is pleaded it made a complicated issue; but *per Cur'* it is good enough, and shall be taken *Reddendo Singula Singulis*, and the plaintiff might plead *Nul iiel Record* to each severally. 2. It is not said, that the judgments were had *pro veris & justis debitis*, as the use is, and principally in this case it ought to be; because the judgments are *per Non sum informatus* in actions of debt which lie not against executors, and so there is appearance of collusion: but *per Cur'* it is good enough, for it shall come by plea on the other part; for if they were not *pro veris debitis*, the defendant might plead it, and put the plaintiff to prove the verity of them, or might plead fraud and covin, and put the plaintiff to prove the consideration. 3. It was strongly argued by the † *defendant*, that actions of debt will not lie against executors upon simple contract by the testator; and for that they admitted judgments against them in such actions shall not have the advantage to plead those judgments which they might reverse when it pleased them, and that no other might be avoided or reversed in bar of just debts; for by such means, when they have barred the plaintiff of his debt, they might afterwards reverse those judgments, and have again or discharge the

† Quære, if this word [*Defendant*] should not be *Plaintiff*: from the sense of the argument?

money

money to their own use. And to this opinion *Keiling* chief justice, inclined upon the first argument in *Mich.* term; but afterwards *term. Pasch. prox.* he and *Twisden*, *Windham* and *Morton*, all agreed, that judgment should be given for the defendant; for although that they might have abated the actions, yet if they had so done, the plaintiffs might have charged them in other actions *sur Assumpsit*, and so they would have put themselves to double charge, which they are not obliged to do when the debts are true and just, and in their conscience ought to be paid; and if they were not such, the plaintiff might put them to prove by pleading the verity of their debts, or by pleading of fraud, or traversing the truth of the debts, in which, if they fail, the plaintiff shall recover his debt, and no room for the suspicion, that the plaintiff should reverse the debts and retain the money. And the old books, which hold that actions of debt lie not against executors upon simple contract, hold also that there was not other remedy; but the law is now otherwise, that although the debt upon simple contract may not be recovered against executors by action of debt, yet it may by *Assumpsit*. *Levinz* 1 part 200. *Palmer v. Lawson*.

In Cancellaria, It was said by *Fontaine*, serjeant, to have been resolved in that court, and then admitted by the master of the rolls alone in court to be reasonable, that if a man devise lands for payment of his debts, and make an executor, and leave a personal estate, that no part of the personal estate shall go to the payment of the debts; because by the making of
an

an executor the testator's intent appears; that the executor should have the goods, because the testator hath made another provision for the payment of his debts; but if a man dispose of lands for the payment of his debts, and afterwards dieth intestate, the personal estate shall be chargeable in the hands of the administrator to the payment of his debts; for thereby more lands shall remain unfold for the benefit of the heir, or more of the money by the sale of the land shall remain to the heir, and no intent appeareth that the administrator should have any thing. *Levinz 1 part 203. Feltham v. Executores de Harlston.*

Debt in the *Detinet*, and declared upon a judgment, had for himself against the defendant as administrator of *Lane* for 27 *l.* damages in *Assumpsit*, and 8 *l.* costs, and shewed not how, if the damages, or if costs were *de bonis suis propriis*, but generally *quod cum recuperasset 27 l.* for damages, and 8 *l.* for costs: Upon which the defendant demurred generally, and pretended the declaration was insufficient; for if it was *de bonis suis propriis*, as it might be for the damage upon *ne unq; administrator ou executor*, then it ought to be in the *Debet*; or if the costs are *de bonis propriis*, as they ought to be, if he had not assets for them it ought to be in the * *Debet*; but at the day the defendant came not to maintain his demurrer, upon which judgment was given for the plaintiff. *Vide 2 Cro. 545, 546.* It is good in the *Detinet*, because it shall be assets when it is recovered, be it the one or the other. *Levinz 1 part 231. Wheately v. Lane.*

* Qu. if this
ought not to be
Detinet.
Cro. J. .
1 Saund. 216.

Debt

Executors.

Debt in the *Debet* and *Detinet*, upon a judgment against an executor, and count that he had wasted divers goods to the value of the debt, and shewed not the certainty of the goods wasted, the defendant demurred upon the declaration; and it was argued, That this action did not lie in the *Debet* and *Detinet*; for if so, it should charge an executor of an executor which may not be, because it is no other than a personal wrong. 9 H. 6. 9. 3 Cro. 530. 11 H. 4. 56. were cited as authorities for the defendant; to which it was answered, That it is more than a personal tort; he is charged here for having of the goods, and coverting them to his own use. The executors of a sheriff shall not be charged for an escape; but if the sheriff levy the money, and detain it, his executors shall be charged for it. 1 Cro. *Parkinson v. Gilbert*. And to the case 11 H. 4. there is not any *Devastavit* laid; but to maintain this action were cited 11 H. 6. 7, 8, 16, 17, 18. where upon a *Devastavit* the executor is chargeable in the *Debet* and *Detinet* by *Strange*, *Pafton* and *Babington*, and in divers other cases; and of such opinion were all the court here, and did give judgment for the plaintiff. *Levinz* 1 part 255. *Wheatly v. Lane*.

Skelton brought debt upon a bond against *Elizabeth Maddox* an administratrix, who suffered judgment to go against her by default; she makes her *will* and the defendant *Hawling* executor thereof, and dies; and this action upon the judgment is brought against *Hawling* suggesting a *Devastavit*, *Hawling* pleads that he has fully administered the goods and effects of *Elizabeth*

betb Maddox; and to prove a *devastavit* the judgment by default was given in evidence at the trial; and whether a judgment by default against the defendant's testatrix, who was an administratrix, is an evidence of a *Devastavit*, was reserved for the opinion of the court. After argument and time taken to consider, the court gave judgment; that if an executor or administrator suffers judgment to go by default or confession, and an action be brought against him on that judgment suggesting a *devastavit*, he cannot plead *plene administravit*, for by the confession of the judgment, or letting it go by default, he has admitted assets to the amount of the demand; And it is the same if the action on the judgment, be against the executor or administrator of an executor or administrator; so judgment was given for the plaintiff. *Skelton v. Hawling* executor, &c. 1 *Wilson* 258.

* Debt against two as executors, they plead a judgment obtained against one of them as administrator; the plaintiff demurred and objected,
 1. Because the action and judgment is against him as administrator; which he might have avoided by plea in abatement, that he was executor.
 2. Because it was only against one, which lieth not without the others; to which it was answered

* Debt against defendant as administrator of F. he pleads a recovery against him as executor; and besides to satisfy that he has not any assets; and upon demurrer thereto, it was adjudged a good plea, and he shall not be twice charged; wherefore it was adjudged for the defendant. *Smalpeace v. Smalpeace*, Mich. 40. El. Cro. El. p. 646.

and

and resolved, That the judgment was well pleadable in bar; and to the first was cited 3 *Cro.* 646. adjudged in point, and the case of *Wheatley and Lane* in this court before; and to the second, 3 *Cro.* 437. And although that the action was not well brought, the defendant was not obliged to plead in abatement, and put himself to greater charge after that there was a true debt, and a recovery had upon the right of the debt. *Levinz* 1 part 261. *Parker v. Amis, &c.*

Scire facias against an executor upon a judgment in *Assumpsit* against the testator; the defendant demands *Oyer* of the judgment; upon which it appeared, That the testator died after verdict had by the plaintiff upon *Non assumpsit*, and before the day in bank (leaving the defendant his executor) and the judgment upon which the plaintiff brought the *Scire Facias* was entered in the next term upon the new statute made at *Oxford*; and the defendant pleaded a debt due to him by obligation of the testator of 100 *l.* and a judgment by the testator to my Lord *Arlington*, and that he had not assets above 40 *l.* which he retained to satisfy himself, and the Lord *Arlington*; upon which the plaintiff demurred; and now the principal question was, If this judgment to the plaintiff should so relate, that it should be to all intents as a judgment had against the testator in his life; and the case was argued at the bar three several times, and judgment was given for the plaintiff. *Levinz* 1 part 277. *Burnet v. Holden executor of Greenbill.*

Debt by three executors, by attorney, of whom one of them was within age; the defendant pleaded, That he was within the age of 17 years; upon which the plaintiff demurred, and

two

1 *Vent.* 40.
1 *Mod.* 296.
2 *Stra.* 1220.

two points were argued at the bar. 1. If an infant, and other executors of full age, join in an action, if the infant ought to do it *per* guardian. 2. If the infant ought to be omitted, and the suit only in the name of those of full age: And the court being divided delivered their opinions severally, but judgment was given that the defendant *Respondeat ouster*. *Levinz 1 part 299, Foxwist v. Tremaine.*

Debt upon obligation conditioned to perform an award, and upon demurrer the case was such, the plaintiff as executor, and the defendant, submit all controversies, &c. The arbitrators award, That the defendant should pay to the plaintiff 300 l. A creditor of the testator attached it in the hands of the defendants, as the debt of the testator; and if it were attachable as the debt of the testator was the question: For it was agreed, That it should be affets in the hands of the plaintiff when he recovered it, the submission of the plaintiff being only as executor: And after argument it was agreed, That the sum awarded was not attachable in the hands of the defendant. *Levinz 1 part 306, Horsey v. Turges.*

See the case of
Fisher administratrix
v. Lane and
others.
3 Wilton Trin.
12 Geo. 3.

Resolved, That an eviction being of the testator, he could not have heir or assignee of that land, but the damages should be recovered by the executors, although they are not named in the covenant, for they represent the person of the testator. *Levinz 2 Rep. 26. Lucy v. Levington.*

Covenant against *Vanlore*, and all claiming under him, one claimed under him by act of parliament made after the covenant. *Levinz 2 part 26, Lucy v. Levington.*

Assumpsit by the plaintiff, an attorney of the court, by original, and declared *in propria persona*, upon his privilege *secundum consuetudinem curiæ*; the defendant pleaded a recognizance not satisfied, and also a judgment in debt for 5000 *l.* upon a goldsmith's note, to be paid with interest upon demand, and it was not paid till such a time after and the interest amounting to 1700 *l.* the judgment against him was for 6700 *l.* and that he had not assets beyond 40 *l.* chargeable to this recognizance and judgment, and upon demurrer the plaintiff had judgment; *per tot' Cur'*. 1. The declaration was ill, declaring by privilege upon original; for the privilege of attornies is in suits by bill, but when they sue by original, they ought to declare as other persons in common, but that is only form, and remedied by the general demurrer. But 2dly, The plea is ill, pleading a judgment for interest, which is a *Devastavit* to permit it to run in arrear, and then to suffer judgment for it; and want of assets to pay it before it incur by the administrator, shall not be intended, not being expressly pleaded. *Levinz 2 part 40. Seaman v. Dee, administrator de Everrad.*

A. and *B.* were bound jointly and severally to *C.*; *A.* made *D.* his executor and died; *D.* made *C.* the plaintiff the obligee his executor and died. *C.* the obligee brought debt upon this obligation against *B.* who pleaded that *A.* made *D.* his executor.

ecutor, who made the plaintiff his executor, and that the plaintiff had administered the goods of *A.* ; but saith not to the value of the debt, nor to what value, but generally that he hath administered the goods ; upon which the plaintiff demurred, and had judgment : for the obligation being joint and several, although that one of the obligors shall be discharged in this manner, yet the obligee may sue the other, if he hath not obtained full satisfaction by the administration. *Levinz 2 part 73. Cock v. Cross.*

Debt for rent, and laid the action in *London*, supposing the lease to be made there of lands in *Oxfordshire*, and that lessee entered and died, and the defendant entered as executor, and brought the action in the *Debet* and *Detinet* ; and upon demurrer upon the declaration, judgment against the plaintiff : for although that the defendant is sued as executor, he is charged as assignee in the *Debet* and *Detinet* upon the privity of the estate, not upon the privity of contract ; and the action ought to be brought where the land lieth. *Levinz 2 part 80 Cormel v. Lisset.*

This case was tried before *Hale*, at the *Guildhall*, after the end of the term ; an executor wasted the goods of the testator, and died leaving assets and the defendant his executor ; and if he shall be charged for the assets was the question ? and *Hale* held it was a personal wrong which died with him that did it ; but upon the importunity of *Saunders*, of council for the plaintiff, he permitted it to be found specially ; and in another term it was adjudged according to the opinion of *Hale per tot' Cur'*. *Levinz 2 part 110. Brown v. Collins. Vide ante 163.*

See i Wilfont 57.
and ante 12, 93.

But in the case of an executor of his own wrong, it was adjudged contrary. *Levinz 2 part 133. Asty v. Nevit.*

Error of a judgment in *Assumpsit* against the defendant an executor, where the plaintiff declared, that whereas the testator was indebted to him, the defendant assumed that in consideration the plaintiff had at the request of the defendant accompted with him, upon which he was so much in arrear, the defendant then promised to pay it; the plaintiff there had judgment *de propriis bonis* of the executor, and assigned it for error; but resolved it to be no error: for the plaintiff was not bound to accompt with the executor, and he did it at the request of the executor; and by *Hale*, although that a bare account will not bind an executor to pay *de bonis propriis*, yet a promise upon consideration of forbearance would; and the case here is all one; for it ought to be intended that an express request was made to accompt, and upon that an express promise to pay; otherwise the evidence would not maintain the declaration; upon which the judgment was affirmed *per tout le Court. Levinz 2. part 122. Hawes v. Smith.*

Debt upon an obligation against baron and feme executors, and counts upon a *Devastavit* by them, and upon demurrer, judgment against the plaintiff. 1. Because the feme covert can not commit waste during the coverture, although that the waste of the husband shall charge her if she survive, according to *Beaumont* and *Long's* case, and 1 *Cro. Mounson* and *Bourne's* case. 2. They [the court] would not carry this action further than they have done, that is to say, to debt upon a judg-

Mich. 14 Car.
Cro. Car. Moun-
son & ux' v.
Bourn, p. 518,
526.

a judgment, but not to debt upon an obligation, and between *East v. Withers*, it was adjudged, that debt doth not lie upon an obligation against an executor counting of a *Devastavit* *Levinz 2 part 145. Horsey v. Daniel.*

Debt upon an obligation against the defendant as executor, and count upon a *Devastavit*; the defendant pleaded several judgments, and that he had not assets above 5 *l.* chargeable to the judgments, and not sufficient to satisfy them; upon which the plaintiff demurred, and upon argument judgment for the defendant; for the action in the *Devastavit* against an executor upon an obligation doth not lie: although that in an action upon a judgment and count of a *Devastavit* it well lieth; upon which the plaintiff prayed leave to discontinue, and had it. *Levinz 2 part 209. Eut v. Withens.*

Judgment against baron and feme executors, *Quod recuperent debitum de bonis*, omitting *testatoris*, and damages *de bonis le Baron propriis*; in debt upon the judgment declaring of a *Devastavit*, it was resolved, that although the first judgment is ill, yet it is good to maintain this action till it be reversed; for the advantage of the error shall not be taken so long as it remains unreversed. But 2dly, It was adjudged that this action lieth not; for although that the wife, if she survive, shall be charged for the waste committed by her husband, yet she shall not be charged for the costs recovered against the husband *de bonis propriis*; for which upon demurrer, judgment for the defendant. *Levinz 2 part 161, Horsey v. Daniel.*

Executors.

Assumpsit, and declared that the defendant accounted with him being executor to *J. S.* as executor, upon which account so much was due, and he promised to pay it; and upon *Non Assumpsit* the plaintiff was nonsuited; and the question was, if he should pay costs; and *Wild* held, that he ought to pay costs, because he did not sue as executor, nor produced the testament, but founded the action upon an account with himself. *Rainsford* chief justice, *Twisden* and *Jones contra*; for the action is in the right of his executorship, and the money to be recovered should be assets, and they gave judgment accordingly. *Levinz 2 part 165. Bull v. Palmer.*

Scire facias upon a judgment against the defendant, and alledged, that he had wasted the goods, and disposed and converted them to his own use. Issue *Non Devastavit, vendidit seu in usum suum proprium convertit*; special verdict found, that one *A.* was liable to an action of trover to the defendant for goods of the intestate; and that after action brought the defendant and *A.* came to an agreement by articles, that the defendant should discharge *A.* and that *A.* should pay to him a sum at such a day yet to come; *Et sic, &c.* and it was argued by *Eyre* for the plaintiff, that the issue is found for him; because the defendant, by acceptance of a new security for payment of the money to himself, had extinguished the old right, as if he had accepted an obligation for a debt due by contract and thereby hath made himself subject, although he hath not yet received the money; for the new security is as payment to him. *Yelverton 10.* To which it was answered by *Pollaxfen*, that it could

could not be a *Devastavit*, for he hath not done any wrong, but hath taken the best means that he might for to secure the estate; and it is not like the case of an obligation taken for a sum due by simple contract; for there is a debt certain, here are only damages to be recovered in the discretion of the jury, which are made certain by the articles, but are not Affets in his hands till the money received. *Curia*, It is not a *Devastavit*: but after, by Sir Thomas Jones, it is a disposal or vendition, and conversion to his use, by the acceptance of a new security, by which he hath discharged the ancient right to the goods, and so it is *quasi* a sale of them, and affets presently, although that by his act the money is not payable to him till a day to come; to which some of the other justices seemed to incline; but it was adjourned; and after, at another day the next term, all the justices agreed, that it was a disposition by him, and judgment was given for the plaintiff *per tout le court*. *Levinz 2 part 189. Norden v. Levit.*

Debt against the defendant as executrix to her husband; the defendant imparled, and then pleaded *Adio non*, because that her husband died intestate, and administration was committed to her, *Absq; hoc*, that she is executrix, or at any time administrated as executrix. Upon which the plaintiff demurred; and it was said for the plaintiff, that this plea is no other than a misnomer which goeth only in abatement, and therefore is not pleadable after general imparlance, and it is not like to a plea of *Ne unque executor*, which totally estrangeth him from the testator; here she admits herself chargeable to the action, but

in other manner, *scil.* as administratrix. To which it was answered for the defendant, that although that this plea doth not go to the right of action, yet it is to the action of the writ, as *Robinson's case*, 5 Co. And it is a bar to the plaintiff, so that he shall not at any time charge the defendant as executrix, and so it is more than in abatement, although that it is no bar to the right, when the plaintiff will charge the defendant, as he ought to have administered; but *per Cur'* this plea is only in abatement, and therefore not pleadable, as here after general imparlance, for which they gave judgment for the plaintiff. *Similis Casus & Simile iudicium eodem tempore inter Howley & Sibly*, *Levinz 2 part 190. Granwel v. Sibly.*

Where one of the executors is an infant, and may not prove the *will*, administration *durante sua minori ætate* may be granted to the other who alone shall bring the action; and it is not inconsistent that he shall have the administration in such case; for that it is not granted as upon one dying intestate, for the *will* is proved, but only enables him to sue alone, because that the other is not capable to prove the testament, and so not to join with him, and he may sue alone; and *Hatton and Maskal's case* was cited, which is entered in *B. R Mich. 15 Car. 2. Rot. 703.* the roll of which was then brought into court, where it appeared to be so adjudged; but where both executors are at full age, there, although that the *will* be proved by one alone, the action is to be brought in both their names. *Levinz 2 part 240. Colborne v. Wright.*

Upon

Upon general pleading *Riens per descent*, a reversion in fee upon an estate-tail is not assets to charge the heir. *Levinz 3 part 287. Kellowe v. Rowden.*

Debt for rent and declared on a lease made by the plaintiff to *J. S.* who made *J. D.* executor, who assigned the term to the defendant; the defendant pleaded, that before any rent arrear, he assigned the term to *J. G.* but did not plead notice of it, nor acceptance of the rent from him by the plaintiff; whereupon the plaintiff demurred; and it was adjudged for the plaintiff, by *Pollexfen* chief justice, and *Rokesby* justice, *contra Powel* justice, who held, that the privity of the contract being altered by the assignment of the executor before any rent due, and also the privity of estate by the assignment of the assignee of the executor, nothing remained whereupon to maintain the action. *Pollexfen* chief justice, and *Rokesby* held, that till notice of the assignment it was not a compleat assignment to destroy the privity of estate, but till notice he remained tenant as to the payment of the rent. As in the case of lord and tenant; if the tenant make a feoffment, yet he remains tenant as to the avowry, till notice of the feoffment and tender of arrears. *Levinz 3 part 295. Tongue v. Pitcher. 3 W. & M. in C. B.*

1 Sid. 266, 338.
1 Lev. 127, 308.
2 Lev. 231.
2 Saund. 181,
182, 302, 303.
2 Vent. 209.
3 Mod. 325.
4 Mod. 71 to 76.
1 Show. 340.

Executor of his own wrong may be of a term, and shall be charged in waste. *Levinz 3 part 35. Major & Com' de Norwich v. Johnson, Mich. 33 Car. 2.*

Assumpsit against the defendant executor of *Walwin*; the defendant pleaded an obligation of 40*l.* entered into by the testator, yet unpaid, and

Vide ante p. 156.

and no assets beyond 5 *l.* which were not sufficient to satisfy the aforesaid debt. The plaintiff replied, that the obligation was conditioned to pay 20 *l.* at a day yet to come; and upon demurrer judgment for the defendant: because the plaintiff did not say in his replication, that the defendant had assets *ultra* to pay the 20 *l.* for if he had not, he was not oblig'd to pay the plaintiff the debt upon contract, before the debt due upon an obligation at a day yet to come. *Levinz 3 part 57. Lemun v. Fooke, Trin. 34 Car. 2 in C. B.*

Assumpsit, as assignee of commissioners of bankrupt, *scil.* *Staly* a goldsmith, where upon *Non assumpsit* and a special verdict, The case was, That *Staly* being indebted to *Walter* in 1000 *l.* upon judgment and to divers other persons, particularly to one *Clark* in 1000 *l.* who died and made one *Crew* his executor: *Crew* sued a bill of *Middlesex* against *Staly*, Nov. 6. which was before the probate of the *will*, that being not till the 18th of *Nov.* *Staley* was arrested before the probate, *scil.* the 8th of *Nov.* and put in prison; and the same day that the probate was, *scil.* the 18th of *Nov.* *Staly* paid the 1000 *l.* to *Walter*; but if the payment was before the probate or after, appeared not, but it was upon the same day; and after this, a commission of bankrupt is sued against *Staly*, and the commissioners assigned this 1000 *l.* paid to *Walter* to the plaintiff, as part of the estate of *Staly*. And in this case divers points were, in which the court did not unanimously agree; but in one they all agreed, *scil.* that the arrest of *Staly* by the executor, before the probate, was not legal as to *Walter*, and then *Staly* could not become bankrupt the 8th of *Nov.* when the arrest was made,

as

as to *Walter*; so that the payment to *Walter* was good. They agreed, that between the parties, that is, between *Crew* and *Staly*, the bill of *Middlesex*, and the arrest upon it before the probate, were made good by the probate after, according to 1 *Roll. Execut'*, 917. Executor sued a writ, and arrests a man before probate, and afterwards proves the *will*, all is made good between them being parties: But in the case here it shall not prejudice a third person *Walter*, to make the payment to him ill, which had been good, if it had not been for this arrest; which *in rei veritate* cannot be good before probate, although that between the parties it is good by relation. Note, That the words of the statute are, That a man arrested, and in prison six months, shall be a bankrupt from the time of the first arrest; and here *Staly* was arrested the 8th of *Nov.* and lay in prison six months. *Vide Raymond* 478. Error of this judgment, and the judgment affirmed. 1 *Ventr.* 370. *Levinz* 3 part 57. *Duncomb v. Walter.*

1 *Roll. Execut'*, 917.

The relation shall not prejudice strangers.

Trin. 34 *Car.* 2.
3 *Lev.* 576. *B.*
Pasch. 36 *Car.* 2.
1 *Vent.* 370.
B. R.

Trover by an administrator, and count that he himself was possessed of the goods and lost them, and the defendant converted them; and upon *Non cul'* verdict for the defendant; and the question was. If the plaintiff should pay costs: For it was objected by *Seis*, serjeant, that the action being of his own possession, he need not have named himself administrator; and he cited *Atky* and *Heard's* case, 1 *Cro.* where, in such a case, the plaintiff paid costs: But on the other side were cited *Peacock's* case; where, in ravishment *de gard* by an executor of a ravish-

4 *Mod.* 244.
2 *Lev.* 165.
2 *Jon.* 47.
1 *Vent.* 92, 94, 166.
Cro. El. 228, 593.
Cro. Car. 29.
Hut. 78.
2 *Cro.* 229, 361.
Yelv. 168.
3 *Leon.* 152.
6 *Mod.* 91.
1 *Sal.* 207.
Vide 4. *Jac. c.* 3.
In *Peacock's* case the issue was found for defendant.

dant. *Vide* 8 *El. c.* *Mich.* 7 *Car.* in *Atky v. Herd*, in such a case plaintiff paid costs. *Cro. Car.* 219. *Vide* 23 *H. S. c.* 15.

ment

Executors.

ment in his own time, the plaintiff being nonsuit paid no costs; and *Bull and Palmer's case*, *Pascb.* 28 *Car.* 2. *B. R.* *Assumpsit* by an executor upon *insimul computasset* with him for a debt due to the testator, the executor nonsuit paid no cost; and now *per tout le court*, the plaintiff shall pay no cost; for all is in the right of the intestate, although that the conversion was done in the time of the administrator, and the damages and costs recovered or lost shall be upon the account of the testator. *Levinz* 3 *part* 60. *Mason v. Jackson*, 34 *Car.* in *C. B.*

5 *Co.* 82.
Cro. El. 400.
 2 *Saund* 49.
 1 *Mod.* 175.
Vaugh. 94, 95.
Keilw. 74.
 1 *Sid* 21.
 3 *Mod.* 115.
Vide ante p. 147.

Debt for rent upon a lease-parol for three years from the 28th of *Sept.* 1685. rendring 90 *l.* *per ann'* rent, and for 270 *l.* Rent due *Mich.* 1688. was the action brought after the term ended against the defendant executor of the lessee, who pleaded an obligation entered into by the testator, and that he had not assets *ultra* 5 *l.* which are not sufficient to satisfy the debt upon the obligation; the plaintiff demurred; and the question was, If this rent upon lease parol and the term ended be payable before the debt upon obligation; and it was argued for the plaintiff, that the rent being due upon real contract, although it be by parol, is of a more high nature than the obligation: But for the defendant it was said, that the term being ended, the arrears are become meer personal; otherwise it had been perhaps, if the lease had remained *in esse*, because then the plaintiff might have distrained for it. The authorities cited were *Style* 2. 61. 1 *Rol. Abr.* 927. *f.* 2. 3. 11 *H.* 4. 79 *b.* 13 *H.* 4. 9. none of which come directly nor is there any authority to be found in the books direct in this case. *Quod Cur' admirabat'*, being a
 case

case which often happened. *Pollexfen* justice inclin'd for the plaintiff for the defendant could not wage his law, which proved it not to be merely personal. *Powel*, justice, inclin'd to the difference, where the lease parol is determined or not ; & *adjornat*'. But afterwards judgment was given *per tot' Cur'* for the plaintiff. Upon which a writ of error was immediately brought in *B. R.* and in *Trin. 3. W. & M.* the judgment was affirmed *per Holt* chief justice and *tout le court* ; who held, that the contract remained in the realty, notwithstanding the term was determined. *Pemberton* for the plaintiff ; *Levinz* for the defendant. *Levinz 3 part 267. Newport v. Godfrey.*

Debt upon an obligation against baron and feme, 'as the feme was heir to *Bostock*. The defendant pleaded in abatement another action depending against the husband, and others, as executors of *Bostock*. The plaintiff demurred ; and it was argued for the defendant, that the plea was good ; for admit that the plaintiff might charge the heir or executor at his election, or both severally, and recover part against one, and the residue against the other, yet he may not charge one and the same person as heir, and also as executor at the same time ; for by that means he might have two judgments at the same time for the same thing, for which the defendant could not have any remedy by *Audita querela* ; for he might not alledge it for relief in *Audita querela*, because he might have pleaded it in abatement. But where an action is against one person as heir, and another action against another person as executor, and he hath two judgments, and after that he hath levied the debt upon one, he endeavoureth to levy it again
upon

Executors.

upon the other; he shall be aided by *Audita querela*, because that he could not have pleaded it in abatement; and of such opinion was *Pollexfen*, chief justice, upon the first argument in that term; but *Powel*, justice, *contra*. For being one and the same person representing as well the heir as the executor, it is all one as if it was in divers persons. *Rookesby* then silent; but afterwards, in another term, *Pollexfen* being dead, judgment was given by *Powel* and *Rookesby*, justices, that the defendant *Respondeat ouster*. *Levinz* 3 part 303. *Haight v. Lanham*. *pas.* 2. *W. & M. in C. B.*

Debt against them as executors of *Bostock* upon the obligation *supra*, *Langham* pleaded in abatement another action depending against him, and his wife, as she was heir; the plaintiff demurred, and the judges differed in opinion *ut supra*. *Adjornat' ulterius arguend'*. *Vide* 36 *E.* 3. 36, 38. Two writs brought for the same thing, each pleaded in abatement to the other, and both abated. The like opinion 9 *H.* 6. 51. and 39 *H.* 6. 38. and *Co.* 5. *Sparry's case*. The reason of the abatement of the writs was not only because he shall not be twice charged, but that he shall not be twice vexed for the same debt. And that the obligee might charge the heir or executor at his election, or both, if the one hath not sufficient. *Vide* 1. *And. Pl.* 13. The heir charged, although the executor had assets. *Fitz. Execution*, 163. *Dyer* 204. In debt against the heir, it is no plea that the executor hath assets. 7 *H.* 4. 2. Debt lieth not against the heir, until the sheriff return'd that the executor hath no assets; and *Co.* 2 *Inst.* 233. and 7 *E.* 4. 13. *a.* Opinion that
debt

debt lieth not against the heir, if the executor hath assets. And afterwards judgment was given as in the case above, *de Respond. ouster. Levinz 3 part 304. Haight v. Langham, Hall, &c. Executors de Bostock. Pas. 3. W. & M. in C. B.*

Debt upon an obligation; the defendant pleaded a judgment against him as executor upon an obligation of the testator, but did not conclude *prout patet per recordum*, and pleaded divers other judgments well, and that he had fully administered *Omnia bona testatoris præter 10 s.* which are charged with the said judgments, and not sufficient to answer them. The plaintiff replied, *Protestando*. that all the judgments were had by fraud, for plea saith, that on the day of the writ there was not more than 100*l.* due upon all the judgments, and that the defendant then had assets sufficient to satisfy the judgments, and also the plaintiff his debt, and that he permitted the judgments to remain in force to defraud him; upon which the defendant demurred generally; and now it was resolved by the court; First, That this general pleading of assets sufficient to satisfy all the judgments and the plaintiff, was good: but then, secondly, The material part of the plea is the assets, and of that no *Venue* is laid where he hath assets, as it ought. And therefore the assets is not triable, and that is an incurable fault. But then, Thirdly, It was objected that the plea was ill, not concluding, *prout patet per recordum* of the first judgment. To which it was answered, that the fault of it is no other than a default of trial by the record, which is past over by the replication which hath admitted all the judgments; but that

Vide 4 & 5 Ann.
c. 16.

that the defendant hath assets *ultra* to satisfy them, which is no more than the omission of a *Venue* for trial by the country, which is always cured by the pleading other matter over to be tried, which is the assets here, and of that *Cur' advisare vult*: but after ruled it accordingly. *Levinz 3 part 311. Knighton v. Morton Executor, 3 W. & M. in B. R.*

Debt upon an obligation against an executor, the defendant pleaded several judgments obtained against him upon several obligations made by the testator, and that he had not assets *ultra*, &c. The plaintiff replied as to an obligation of 200*l.* that it was upon condition to pay 100*l.* and so to all the others severally; and that the defendant had assets to pay the plaintiff & *ultra* to satisfy the said lesser sums, *scil.* at such a place. The defendant rejoined, that he had not assets *ultra* to satisfy the debts and judgment in his plea. Upon which the plaintiff demurred specially because the rejoinder did not directly answer the replication, but ambiguously: and now it was argued by *Pemberton*, that the defendant ought to have rejoined, only that he had not assets *ultra* to satisfy the said lesser sums, and not to make the penalties in the judgments parcel of the issue; for if he had assets *ultra* the lesser sums, he ought to pay the plaintiff. To which it was answered, and resolved by the whole court, that the rejoinder was good; for the penalties are legal and due debts till they are satisfied, under which he might defend himself against other actions; for although that in equity and conscience the lesser sums were only due, yet perhaps the plaintiffs
in

in them will not accept the lesser sums in satisfaction of the judgments without suit in equity; and if they would, or offer to accept the lesser sums, and the defendant will not pay them, the plaintiff may help himself by another manner of pleading, *scil.* That the plaintiff would, and offered to accept the lesser sums, and the defendant would not pay them, but kept the judgments on foot by fraud and covin; and so upon the issue of fraud and covin, the plaintiff might give in evidence of such matter that should serve him to avoid the penalties; but he cannot aid himself by such general manner of pleading, as it is in this case at bar; for which judgment was given for the defendant *per tout le court*, *scil.* *Treby, Nevil, Powel and Rookesby*. But then it was prayed by the plaintiff, that he might replead, which was granted to him by the court, upon condition that the defendant might also replead in bar, and plead more judgments if he had any to plead, but not otherwise. *Levinz 3 part 368. Thompson v. Hunt Trin. 5 W. & M. in B. R.*

Scire facias against the defendant, executor of *J. S.* upon a decree in the exchequer against *J. S.* for money. The defendant pleaded, that the testator was indebted to him upon obligation, and that he had paid himself before the *Scire facias* brought, or notice of the decree. This case having been heard before, was ruled by *Lechmore and Turton*, barons, against Baron *Powel*, that it was not any bar. And now upon rehearing before all the barons, *Atkins*, chief baron, agreed with *Lechmore and Turton*, *contra Powel*, that it was not any bar. And that a decree in

Executor obliged by decree in equity to pay money, equally as by a judgment at common law.

equity doth oblige executors, in equal degree at least, with a judgment at common law. *Levinz 3 part 355. Shafto v. Powel in Scaccario.*

Assumpsit lieth for executors for a copyhold fine set by the testator. *Levinz 3 part 261. Sbetleworth v. Garnet. 1 W. & M. in C. B.*

3 Mod. 239.
Show. 35.
1 Danv. 28. pl.
13.
2 Lev. 245.
2 Jo. 126.
2 Mod. 260.
2 Lev. 174.
1 Vent. 298.

In action upon the case, for calling a person of quality *wobore*, by which she lost her marriage; it was rul'd upon motion, that the defendant should find special bail, although that generally in actions for words no special bail ought to be. Yet for the circumstances of the case the court might compel the defendant to find special bail; and so in case against executors, although that they shall not find bail in ordinary cases, yet in special cases they shall find bail, as if it appear that they have wasted the goods, &c. *Levinz 1 part 39.*

Assumpsit, That whereas *Saunders* was indebted to divers persons, and the plaintiff bound for him, and forced to pay them; the defendant, executor of *Saunders*, in consideration that the plaintiff would forbear to sue him for the money, promised to pay him; after verdict for the plaintiff upon *Non Assumpsit*, it was moved in arrest of judgment, that here is no consideration, for it doth not appear that *Saunders* had promised or was obliged to save him harmless; and *Borden and Thin's case, Yelv. 40.* and *Smith and John's case, Owen 132.* were cited. But *per Cur'*; It was equity, that *Saunders* should save the plaintiff harmless, and suit in equity is a suit: or perhaps he might be charged *per plegiis acquietandis*, and therefore they held the consideration good, and gave judgment for the plaintiff,

tiff, *Nisi causa, die Lune prox. &c. Levinz 1 part 71. Scot v. Stephenson.*

Assumpsit against two executors upon the promise of the testator, issue *Non Assumpsit*; one executor died, which is suggested upon the roll, and the trial brought against the other, and verdict for the plaintiff; and in arrest of judgment it was moved by *Jones*, that the bill was abated by the death of one in cases of contract, otherwise in cases of trespass. 50 E. 3. 7. 40 E. 3. 26. b. *Fitzher. Brief 263, 344. & Plowd. Com. 186. b.* In case of executors sued upon contract, the death of one doth abate the writ. † But of that, in case of executors, the court at first doubted; but at another day, having seen the case in *Plowd. Com. 186. Woodward v Davies*, which is direct in the point, they resolved the writ should abate, and the judgment stay'd. *Levinz 1 part 165. Wirald v. Brand.*

† But by the Stat. 8, 9. W. 3. ch. 11. it shall not abate. See the statute.

Debt for rent by the heir upon a lease by the ancestor rendering rent to him, his executors and assigns, during the term; and upon demurrer the question was, if the heir might maintain action of debt upon this lease. And it was argued for the defendant, that the action lieth not by the heir, he not being mentioned in the reservation, but by the death of the lessor the rent determined; for which they cited *Owen 9. Richmond v. Butler, Latch 44, 255, 264. Sury v. Cole.* But *e contra* were cited for the plaintiff, *Pasch. 22 Jac. Rot. 62. Sury v. Cole and Hill. 20 Jac. Rot. 177 Sury v. Browne.* Both adjudged, that the rent continued, against that which is reported in *Rolls* and *Latch*, in these very cases. *Hale* chief justice; the rent being reserved to him, his exe-

cutors and assigns, shall continue after the death of the lessor, and shall go to the heir by the apparent intent that it should endure after the death of the lessor; for otherwise it could not go to the executor, and that without the words during the term; otherwise where the rent is reserved to him, or to him and his assigns. And at another day afterwards, after that the case had been twice argued by *Jones* and *Hunt* for the plaintiff, and by *Bigland* and *Winnington* for the defendant, judgment was given for the plaintiff. *Levinz 2 part 13. Sacheverel v. Frogat. 2 Saund. 367.*

Assumpsit for 100 l. for wares sold by the plaintiff, and one *Witty*, whom the plaintiff survived. The defendant pleaded in abatement, that the plaintiff and *Witty* were joint-merchants, and that by the law-merchant there is not any survivor between them, and that *Witty* made such a one his executor, who hath administered, and is now living, not party to the suit as he ought. Upon which the plaintiff demurred, and upon consideration of *Co. Lit. 172, 182. & F.N.B. 172 E.* it was resolved by the whole court, that the bill should abate. *Levinz 2 part 188. Hall v. Huffam.*

Debt in *London* against the defendant as heir, and it being removed in *B. R.* the question was, if he should find bail here, as he had done in the inferior court of *London*, where they always compel heirs and executors to find bail. Yet of executors there are precedents where executors sued there, and having found bail there, were compelled to find bail here upon removal of the court: but no precedent being shewn for finding

of bail by the heir in such case; *Per Cur'* special bail was denied to be found in this case; and it was said, that *Keeling* and *Hale* had denied it in cases of executors, upon removal of the cause here. *Levinz 2 part 204. Sir John Lawrence versus Bliche.*

Assumpsit by *Hall* and *Wood*, and his wife executrix of *Whitley*, and count, that by the law-merchant there is not any survivor, and that *Hall* and *Wood*, joint-merchants, were possessed of 40 ounces of musk, and sold it to the defendant paying so much *per ounce* as they should sell their other musk, and that they sold the other at such a price, and that the defendant had not paid, and declared also of another promise made to the plaintiff after the death of the testator. After verdict for the plaintiff, upon *Non Assumpsit*, it was moved in arrest of judgment, that the plaintiffs ought not to join but sever for their moieties, because for the executor the action ought to be in the *Detinet* only, and for the survivor in the *Debet* and *Detinet*. 2. The executor himself ought not to join two promises in one action, of which one was made to the testator, and the other to himself; but *Non allocatur*. The judgment is all one for the plaintiff, executor and another, and shall be assets still in the hands of the executor. But a man may not sue an executor and another jointly; for the one is to be charged *De bonis Testator'*, the other *De bonis propriis*. And judgment was given for the plaintiff. *Levinz 2 part 228. Hall, &c. v. Huffam.*

Assumpsit where differences had been between the plaintiff and defendant, (but did not say touching what thing the differences were;) they submitted to the award of J. S. who awarded *de & super Premissis*, that the defendant paid to the plaintiff 30*l.* in satisfaction of all sums due to him out of the estate of one *Woolly*. After verdict for the plaintiff judgment was stay'd, and after divers motions in that and other terms, entered for the defendant; because it appeared not that the defendant is executor, administrator, or trustee for *Woolly*, nor that he had any thing of it, or had submitted upon the behalf of himself; and so no consideration to charge him for the estate of *Woolly*. *Levinz 2 part 235. Adams versus Statham.*

And thus having directed testators in the due and legal forming of their *wills* and testaments, and executors in the true and regular performing of them; that we may be provided for all events, we are to consider how men's estates are to be administrated or disposed of, when there is no will or testament made or declared by them. And this occasionally induceth us to treat concerning

Administrators.

Administrator,
what.

ADministrator is he to whom the ordinary commits the administration of the goods of a dead man, for default of an executor; and an action shall lie against him, and for him, as for an executor. And he shall be charged to
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the value of the goods of the dead man, and no further, unless it be by his own false plea, or by wasting the goods of the dead.

If the administrator die, his executors are not administrators, but it behoves the ordinary to commit a new administration. And if a stranger, that is not administrator or executor, take the goods of the dead, and administer of his own wrong, he shall be charged, and sued as an executor in any action brought against him. *Termes del Ley. verb. Administrator.*

The ordinary shall have an action for goods taken out of his own possession which were the intestate's, but not those taken out of the possession of the intestate in his life-time; but the administrator shall have such action for goods taken out of the possession of the intestate. *F.N.B. 203. F.N.B. 203. Eng.* The process herein is attachment or *Distingas*, and if the sheriff thereupon return *Nihil*, then he shall have *Capias, Alias & Pluries & Exigent*, and so proceed to outlawry against him. *Ibid.*

Where administration is granted by the inferior diocesan, where there is *Bona notabilia*, and after it is granted by the archbishop, or *e contra*, how they shall operate together. *Coke's 8 Rep. 135. Sir John Nedham's case.*

Administrator *durante minore Ætate*, if he waste goods shall be punished as executor of his own wrong.

If administrator avers in his declaration administration granted to him at *London*, and the letters of administration bear date in another place and county, the plaint shall abate. *Touchstone of Precedents 195.*

An executor hath judgment to recover a debt due to the testator, and dieth intestate before execution, and the ordinary committeth the administration of the first testator to one, the administrator shall not sue execution upon that recovery; because he deriveth his interest, and represents the person of the testator, and so before the recovery. *Co. 1 Rep. 96. Shelly's case. Vide 17 Car. cap. 8.*

Vide post p. 123.

Vide post p. 123.
& 124.

Letters of administration obtained by collusion are void, and shall not repeal a former administration. *Co. 3 Rep. 78.*

If an administrator hath judgment and dieth, his executors cannot sue execution of that judgment; for none shall have execution of that judgment, but he who shall be subject to the payment of the debts of the first intestate, and that the said executors are not. And the administrator of an executor shall not have execution of a judgment given for the executors. *Co. 5 Rep. 9. Brudnell's case.*

By 17 Car. 2. c. 8. Where any judgment after a verdict shall be had, by or in the name of any executor or administrator; in such case, an administrator de bonis non may sue forth a Scire facias, and take execution upon such judgment.

If a man lease a house and land for years, with a stock of money, rendring rent, and the lessee covenanteth for himself, his executors, administrators and assigns, to deliver the stock or sum of money at the end of the term; yet the assignee shall not be charged with this covenant: for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenanter, his executors and administrators, but not his assigns. *Co. 5 Rep. 17. Spenser's case.*

And

And if a man release, and after take administration, it shall not bar him, for the right of the action was not in him at the time of the release; but if an executor release before probate, it shall bar him. *Co. 5 Rep. 28. Middleton's case.*

An administrator shall pay a debt due by bond before a statute defeasanced to perform covenants, which perhaps never were nor ever will be broken. *Co. 5 Rep. 28. Harrison's case. Vide ante p. 142.*

Administration *durante minore etate* shall cease at 17 years of age, and if such administration be committed, the executor being 17 years of age, it is void. *Co. 5 Rep. 29. Piggot's case.*

Administrator *durante minore etate* cannot sell Vide ante p. 216. any goods of the deceased, if it be not for necessity for payment of his debts, or *Bona peritura*; for he hath his office of administration *pro bono & commodo* of the infant, and such administration doth cease at the age of 17 years of the infant. And an infant executor cannot assent to a legacy, &c. before the age of 17 years; and if the infant within age of 17 years take husband, if the husband be of full age the administration shall cease.

If the metropolitan pretending the party deceased had *Bona Notabilia* in divers diocesses commit administration, it is not void, but voidable by sentence. But if an ordinary of a diocess commit administration of goods, when the party hath *Bona Notabilia* in divers diocesses, such administration is meerly void, as well to the goods in his own diocess as all others. *Co. 5 Rep. 29, 30. Prince's case. Vide supra, p. 27. and ante Wentw. p. 46.*

By

Administrators.

By the custom of *London*, an executor or administrator is bound to pay money due upon a contract of the intestate, as well as if it were by obligation. *Co. 5. Rep. 83. Snelling's case.*

Executors and administrators shall have actions of debt for all rents arrear in life-time of the testator, and may also distrain for the same. *See 32 H. 8. Wing. Abridgment, Rents 1, 2, 3.*

When administration is committed generally, *Ratione Minoris Ætatis*, without any restraint or limitation, there such leases made by him are good. And such administrator shall have action to recover debts and duties, &c. for the interest of actions is in him, and shall likewise be liable to actions. *Co. 6 Rep. 67. Sir Moyle Finch's case,*

Probate of *wills*, and constituting administrators, originally did not belong to the ecclesiastical consueance, but were given to them of latter times and therefore nothing but the probate, and granting administration, is given to them, or doth appertain to their jurisdiction; but the trial of them is not given to them, for that is left to the trial of the common law. And *21 E. 4. 50.* it is holden, that if letters of administration be denied, the issue shall be, that the ordinary did not commit administration by his letter, &c. For there it is said, that letters of administration may be forged. And forasmuch as it is to be tried by jury, and not by the certificate of the ordinary: nor it needeth not that the *will* or administration be shewed, to enable the plaintiff to his action, proved or granted by the ordinary himself, as in case of

excommungement, which is meerly spiritual, and originally belonging to the jurisdiction of the ordinary. But if the testament be proved, or administration granted by the official or commissary, or in some cases by the archdeacon, or other inferior judges ecclesiastical, who have lawful authority, in such case it is sufficient in law. *Coke's 9 Rep. 41. Hensloe's case.*

Where executors of executors, administrators, and the heir after the age of 14, shall have accompt. *See Co. 2 Inst. 404.*

If the administrator give or sell the goods of the intestate, and after the administration is countermanded, and granted to another, yet the gift or sale is good, unless it be avoided for covin, by *Stat. 13 Eliz.* And if the administrator doth waste the goods, and afterwards administration is granted to another, yet any creditor shall charge him in debt. And if he plead the administration committed to another, the other may reply, that before the second administration committed he had wasted the goods, &c. *Co. 6 Rep. 18, 19. Packman's case.*

There is a great difference between an administration that was once lawful, and an administration that was never lawful. *Vide ibid.*

There is a difference between a sentence declaratory, by which letters of administration are declared to be void; and a sentence of repeal, which allows them to be good till repealed. *Co. 8 Rep. 143. Dr. Drurie's case.*

Ecclesiastical courts, or other person, to take but 1 s. for the seal, writing or suing forth administration, to any seaman dying in pay of the navy, unless he hath goods of the value of 20 l. upon pain to forfeit 10 l. *Stat. 9 & 10 W. 3. cap. 41. Wash. Abridg. Stores 7.*

A Term granted to the use of a feme sole, she dies, her administrator and not her husband shall have it. *Co. 4 Inst. 87.*

There be divers kinds of intestates; one that makes no *will* at all, another that maketh a *will* and executors, and they refuse; in this case he dieth *quasi Intestatus*; and justly did the law in this case appoint the ordinary; for the law presumed, that he who had the care of his soul in his life-time, would, after his death, have care of his temporal goods to see them well disposed of. *Co. 2 Inst. 397.*

Ordinarius in law, in the common sense, signifieth a bishop, or he or they that have ordinary jurisdiction; and is derived *ab Ordine*, to put him in mind of his duty and place.

If the ordinary take goods of the intestate and die, yet his executors and administrators shall be charged in an action of debt. *Vide Co. 2 Inst. 397, 398.*

The probate of every bishop's testament, or granting administration of his goods, doth belong to the archbishop, although he hath no goods but within his own diocess. What fees for probate of testaments and administrations, *vide Co. 4 Inst. 335.*

Ordinary inferior grant of administration is void whilst the prerogative administration granted by the archbishop is in force, for the two administrations

ministrations cannot stand together. *Co. 8 Rep. 135. Sir John Nedham's case.*

The ordinary hath not power to give authority to another to sell the deceased's goods, because he himself hath but an authority; and *Bona deveniunt ad manus Ordinarii disponenda*, that is, for the good of the deceased. *Ibid. 135. b.*

There are three kinds of executors: the first appointed by law, and therefore called lawful, as the bishop or ordinary. The second appointed by the testator, and therefore called testamentary; and the third appointed by the bishop or ordinary, and is called dative as an administrator.

The ordinary shall not have action of trespass for carrying away goods before he hath actual possession of them, (as executors or administrators may have,) but before possession the ordinary may sue for them in the spiritual court; and the ordinary shall not have action of debt as ordinary. *Vide plus Co. 8 Rep. Sir John Nedham's case.*

Where a man as general receiver retained one in the service of his master, taking for his salary 10*l. per Annum* by deed: in this case, although the master might wage his *Ley*, yet the receiver who was made administrator was charged in debt for the salary, for that he was privy to the retainer by his testimony by his bill. But otherwise it is where the thing remains always in the nature of an accompt, for which action lieth not against an administrator. 46 *E. 3. 10. a. b.*

An

An administrator *De Bonis non* may sue out a *Scire facias*, and take execution upon a judgment had in the name of an executor or administrator. *Stat. 29 Car. 2. § 22 § 23 Car. 2. c. 10. Vide 17 Car. 2. cap. 8. made perpetual by 1 Jac. 2. cap. 17.*

The custom of *London*, that a contract shall bind the administrator as well as an obligation, is good, although contrary to common law. *Co. 5 Rep. 83. Snelling's case.*

Where divers are made administrators, they have but one joint-interest, and therefore one of them cannot discharge a debt by himself in prejudice of the others, as one executor may do, as is shewed in the ninth chapter of *Hern*; but in such case all the administrators must join. *Hern's Law Conveyances, p. 88.*

If administration be unduly granted by the ordinary of an inferior diocese, the party grieved cannot have a prohibition at the common law, but he must appeal to the metropolitan or archbishop of the province, from thence to the court of delegates; for the *Stat. of 21 Hen. 8.* doth not say, That the administration shall be committed to the next of blood, or else the administration to be void; but that it shall be granted on such a pain, and so it does not take away the cognizance of the case from the ecclesiastical judge. *Meriton's Touchstone of wills and testaments, p. 227. sect. 361.*

If one die intestate, and the ordinary grants administration to a stranger, and the next of kin sues a citation out of the spiritual court to have the administration revoked, and pending the suit the administrator sells the goods to defeat the
next

next of kin, and then the letters of administration granted to the stranger are revoked, and made null by sentence; yet in this case the sale by the first administrator is good. But if the next of kin had appealed to have the administration revoked, and pending the appeal the first administrator sells his goods; then, in such case, the sale is void. And so note the difference between a suit by citation to revoke a former administration, and an appeal; for an appeal doth suspend the former sentence. *37 Eliz. B. R. Packman's case, Co. 6 Li. fo. 18. b.*

If the ordinary, knowing that there is a testament, and an executor named therein, will notwithstanding grant administration of the deceased's goods, not having first called the executor before him to prove the *will*, or to refuse or accept the executorship; then, in such case, when the executor shall prove the *will*, he may sue the administrator in an action of trespass, notwithstanding the administration granted by the ordinary. *Swinb. part 6. sect. 2.*

If an executor in an action brought by him recovereth, and afterwards dieth intestate, and then administration of the goods of the first testator is committed to *J. S.* in this case *J. S.* before the Stat. *17 Car. 2. c. 8.* could not sue out execution upon such recovery, but was to begin anew; because he comes in paramount to the executor, and claims immediately from the first testator. But see now the late act made at *Oxford, 17 Car. 2. c. 8.* for avoiding of unnecessary suits and delays, which is made perpetual by *1 Jac. 2. ch. 17. and See Co. 5 Rep. 9. Brudenel's case.*

17 Car. 2. cap. 8.
Vide hic ante p.
118.

An

An administrator is not liable in an action of debt upon a contract of the intestate. *Mich. 30, 31. El. B. R. Hughson's and Webb's case, Cro. Eliz. 121.*

But if the administrator after the intestate's death promise to pay such a debt, if there be a consideration to ground the action, it is binding. As thus: The husband was indebted to another man upon a contract for beer, and died intestate; the wife took administration, and afterwards assumed upon herself to the creditor, that if he would deliver her six barrels of beer, she would not only pay for them but her husband's debt also. In this case it was adjudged, that judgment should be entered *de bonis propriis* generally, for it became a charge by her own act; and by her promise as administratrix she hath made it her own debt. *Trin. 37 Eliz. B. R. in Wheeler's and Collier's case, Cro. Eliz. 406.*

An administrator may bring an action of trespass or trover, and conversion for goods taken away before he obtained the administration; for the letters of administration shall relate to the time of the intestate's death, and not to the time of granting them. *M. 1652. B. R. Longe and Hebb's case. Vide ante p. 48. Wentw.*

Note, That the ordinary may call the administrator to account, but he cannot force him to make disposition of the surplusage of the intestate's goods after debts paid, by the true meaning of the 21 *H. 8. c. 5.* But what remains shall go to the administrator; and in case there be any more debts to pay, which as yet are not discovered, the administrator shall be compelled to answer of his own goods; and if the ordinary will

will meddle to cause a disposition to be made, a prohibition will be granted against him, if the administrator request it. *M. 6 Car. 1. B. R. Levant's case, Cro. Jac. 301.*

An administrator accounted before the ordinary, and proved payment by one witness; and because the ordinary would not allow of proof by one witness, but did excommunicate the party for want of proof, a prohibition was thereupon granted; and the book says there, that the jurisdiction of the spiritual court is not taken away by the prohibition, but their proceedings only. *P. 2 Car. B. R. Bellamy and Alden's case, Latche's Rep. fol. 117.*

Note, That a man may die partly testate, and partly intestate, by the laws of this realm, though it is contrary to the civil law; and this he may do not only in respect of time, but also in respect of goods and place: for if a man have goods in divers diocesses, he may make executors of his goods in one diocess, and die intestate, as touching his goods in another diocess; or if a man make one executor particularly of a certain portion of his goods, the executor is only so far chargeable with the payment of the debts and legacies of the testator, as the portion of the goods to him allotted do extend unto; and as touching the residue of the testator's goods, if there be not another executor appointed, then for such goods he is said to die intestate, and administration may be taken of them. *Bro. Execut. pl. 2. Fitz. Abr. pl. 26. tit. executors. Plo. Co. Greybrook and Fox's case, Swinb. part 4. sect. 18. num. 4.*

D d

Where

Where an appeal is made, and the first administration is confirmed, then the use is to send back the cause to the court from whence it came by appeal; but when the first sentence is reversed, then the first court is ousted of its jurisdiction, and the court which reverses it shall commit the administration *de novo*. *P. 1 Car. 1. B. R. Reeve and Denny's case, Latch. 85.*

Appeals in cases testamentary, matrimony and tithes, must be sued from the archdeacon or official (if the matter be there commenced) to the bishop of the diocess, and from the bishop diocesan or his commissary, in such case (when the matter is there commenced) within fifteen days after sentence given to the archbishop of the province, and no farther, but there to be definitively adjudged. *See Num. 368 24 H. 8. c. 12. Wing. Abr. Stat. Tit. Appeals to Rome, num. 5. Co. 4. Inst. fol. 339. Vide 24 H. 8. cap. 12.*

When the cause is commenced before the archdeacon or commissary of the archbishop, the appeal may be made (within fifteen days after sentence given) to the Court of Audience of the said archbishop, and from thence within fifteen days after sentence there, to the archbishop himself, and no further. When the cause is commenced before the archbishop himself, it was to be determined there without farther appeal, by the *Stat 24. H. 8. c. 12. Wing. Abr. Stat. Tit. Appeals to Rome, num. 6.*

But see the *Stat. 25 H. 8.* where it is added further, That appeals shall be from the archbishop's courts to the king in his chancery, where a commission shall be awarded under the Great Seal to certain persons to be named by the
King,

King, for the determination of the appeals, and from thence no further; and these commissioners are called delegates, because they are delegated by the King's commission. *Co. 4 Inst. fo. 339, 340. 25 H. 8. c. 19.*

When the cause or suit concerns the king, the party grieved may, within fifteen days after sentence given, appeal from any of the said courts ecclesiastical to the higher convocation-house of that province, and no further; and there to be finally determined. *24 H. 8. c. 12. Co. 4 Inst. fo. 323, &c.*

Appeals from places exempt, which were before to the See of *Rome*, shall be in the chancery *ut supra*, and not to the archbishop; and shall be determined by the delegates. *25 H. 8. c. 19. Co. 4 Inst. fo. 340.*

But note, That there it is said in the case aforesaid, upon the Stat. *24 & 25 H. 8.* that the sentence should be definitive upon certain appeals there mentioned; yet notwithstanding, the King, as supreme head, upon complaint to him made, may grant a commission of review, for so the pope used to do as supreme head; and the same power which the pope had formerly, doth now of right belong to the crown, and is annexed thereunto, by the *26 H. 8. c. 1.* and *1 Eliz. c. 1.* And so it was resolved, *Tr. 39 Eliz. B. R.* where the case was, that sentence being in an ecclesiastical cause in the country, the party grieved appealed to the archbishop, where the first sentence was affirmed; from thence he appealed to the delegates, before whom both the former sentences were repealed, and made void by definitive sentence; and thereupon

Administrators.

the queen, as supreme head, granted a commission of review *ad revivendum*, the sentence of the delegates. *Co. 4 Inst. 341.*

If the testator make *A. B.* executor after the expiration of five years after his death, or he doth make *A. B.* executor for and during five years after his death; this assignation is lawful, and the ordinary may commit the administration of the deceased's goods in the mean time to the next of kin; during which time the act of the administrator is good, and cannot be avoided by the executor afterwards; and the ordinary may also commit the administration of the deceased's goods unadministred by the executor after the expiration of the time of the executorship, where *A. B.* is appointed executor but for a time. *Swinb. part 4. sect 17. Vide ante Wentw. p. 10.*

One of the half-blood is in as equal degree of kindred to have the letters of administration committed to him, as one of the whole-blood is. *Style's Rep. fo. 74, 75. Hill and Bride's case, fo. 102.*

If the ordinary take any reward or fee for preferring of any one person before another to the administration, it is bribery, and punishable with a fine and imprisonment at the King's pleasure, and frequently loss of his place, *Co. 3 Inst. 148.*

A trust for raising money for a feme sole, if she marry with the consent of the trustees; and if not, then to such persons as the trustees shall name; and for want of such nomination, then to themselves; decreed in chancery, to enure to the administrator of the feme sole. *Cases in chancery 58. Fleming against Walgrave.*

Whom the ordinary shall appoint administrators, who shall have the benefit and be accountable as executors, and take bond for performance, and order distribution, *vide le Stat.* 22 & 23 *Car.* 2. *cap.* 10.

That act shall not extend to the estates of feme covert^{29 Car. 2. cap. 3. sect. 25.} that die intestate, but that their husbands may have administration of their personal estates. *Vide le Stat.*

No administrator shall be cited to render an account of the personal estate of the intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate, as a creditor or next of kin. *Vide Stat.* 1 *Jac.* 2. 17. *sect.* 6.

If after the death of the father any of his children die intestate without wife or children, in the life-time of the mother, every brother and sister, and their representatives, shall have equal share with her. *Ibid. sect.* 7.

No popish recusant convict shall be executor, administrator or guardian, but the next of kin shall have it. *Stat.* 3. *Jac.* 1, 5. *Wing. Abridg.* *Tit. Crown* 41.

If a man die intestate, and a stranger taketh the goods, the ordinary shall not have an action of trespass for taking them, unless he had taken them into his possession. But the executor or administrator, before seizure, may have an action of trespass.

The ordinary cannot have an action of debt, covenant, or any other action which belongeth to the intestate, but those to whom the ordinary commits administration may have all these actions, by *Stat.* 31 *E.* 3. 11. 2 *Inst.* 398.

2 Inst. 398.

If the ordinary take goods of the intestate out of his diocess, he shall not be charged as ordinary by the act *Westm. 2. cap. 19.* because he taketh them in his own wrong.

The ordinary hath like interest in goods and chattels of the intestate, as the administrator to whom administration is committed *durante minore etate executoris, ad opus, commodum & utilitatem ipsius executoris, & non aliter seu alio modo.*

2 Inst. 398.

22 & 23 Car. 2.
cap. 10.

By *Stat. 22 & 23 Car. 2.* all ordinaries, as well judges of the prerogative courts of *Canterbury* and *York*, as other ordinaries and ecclesiastical judges, having power to commit administration of goods of persons dying intestate, shall take sufficient bonds of the person or persons to whom administration is committed, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with condition, according to the form in the statute. And the ordinaries may call such administrator to accompt, and make just and equal distribution of what remaineth clear (after debts paid, funerals, and just expences of every sort first allowed and deducted) among the wife and children, and children's children, if any be, or otherwise to the next of kindred in equal degree, or legally representing their stocks, *pro suo cuique Jure*, according to the laws in such cases, and rules and limitations in the act set down; and to compel the administrators to observe and pay the same by due course of the ecclesiastical laws, saving to every one their right of appeal.

Pro-

Provided, This act shall not prejudice the customs in *London*, or province of *York*, or other places having particular received customs.

The surplufage of fuch eftates to be diftributed as followeth, *viz.* one third part to the wife of the intefate, and all the refidue by equal portions amongft his children, or fuch perfons as legally represent fuch children (if any be then dead) other than fuch child or children (not being heir at law) who fhall have any eftate by fettlement of the intefate, or be advanced by the intefate by portion or portions equal to the fhare fhall be allotted to the others by fuch diftribution, in which cafe the portion is to be made equal to the reft. But the heir at law fhall have equal part, notwithstanding any land he fhall have by defcent, or otherwife.

If there be no children, nor legal representatives, then one moiety of the eftate to the wife, the refidue equally to every of the next of kindred in equal degree, and thofe who legally represent them.

No representatives to be admitted among collaterals, after brothers and fifters children; if there be no wife, then all amongft the children; and if no child, then to the next of kindred in equal degree, and fuch who legally represent them.

No diftribution to be till a year after the death of the intefate, and fuch to whom any fhare fhall be allotted fhall give bond, with fufficient fureties in the faid courts, that if any debts be afterwards difcovered or made, then

to refund proportionably towards payment of them.

In all cases where the ordinary hath used to grant administration *cum testamento annexo*, he may do so still, and the testator's *will* therein to be performed notwithstanding the act.

This act was afterwards continued. *Vide le Stat. 22 & 23 Car. 2. The said act was made perpetual, by 1 Jac. 2. cap. 17. sect. 5.*

By 14 Geo. 2
c. 20. sect. 9.
Distribution
shall be made of
estates pur autre
vie, whereof
there is no spe-
cial occupant,
and which are
undevise'd.

The husband died intestate, his wife had the administration committed to her alone, and after took another husband, and they recovered in debt as administrators, during which suit the son of the intestate, by covin between the debtor and him, obtained other letters of administration to the wife and himself jointly. No cause of revocation or adnullation of the former letters in certain are set forth in the second letters, and after judgment, the son by covin, to defeat the execution, released to the debtor all demands and executions, and afterwards the husband and wife sue execution, and the debtor upon this release sued an *Audita Querela*, and had thereupon a *Venire facias* against the baron and feme, directed to the sheriff of *London*, with a *Supersedeas* in it to stay execution; and the sheriff returned *Nihil habent*, and thereupon they appeared and pleaded the matter of covin aforesaid, and a revocation of the second letters of administration, by sentence exemplified under the seal of the ordinary pendant the *Audita Querela, &c.* and thereupon the parties demur; and all the court were against the plaintiffs, and so adjudged, *Mich. procheinne sans ascun argument. Dyer 339. Pl. 46.*

One *Daniel*, late citizen and goldsmith of *London*, among divers goods and chattels which he had as well in *Ireland* as in *England*, had an obligation of 80 *l.* made in *Ireland* by one *Lucre* a merchant of *Waterford* in *Ireland*. *Daniel* died intestate in *England*, and his son obtained letters of administration from the archbishop of *Dublin*, of all the goods and chattels of his father within that province, and afterwards he made a release of the said debt and action thereupon to the said *Lucre*. And afterwards the widow of *Daniel* obtained from the archbishop of *Canterbury* other letters of administration of all the goods, chattels and credits within his province, and happened to get the obligation; and upon that, as administratrix, she sued *Lucre* in *London*, supposing the obligation to be made there; viz. in Paroch' *Beate Mariæ de Arcubus*, in *Warda de Cheape*; and this release was pleaded in bar, and the truth was, *ut dicitur*, that the obligation was made in *London*, and remained there ever after. And also the obligee died at *Dunstable* in *Com' Bedford*, and thereupon, notwithstanding the said administration and release in *Ireland*, the said *Lucre* the defendant ought to answer to the said action as above brought in *London*, *per Opinionem Curiae*. And issue was taken if the obligation was made and remained in *London*, at the time of the debt, or in *Ireland*; but the issue by the folly of the pleader was joined, if the obligation was made in *London*, viz. in Paroch' *Beate Mariæ de Acubus*, in *Warda de Cheape*, and the truth was, that it was in Paroch' *Sancti Fosteri*, in *Warda de Farindon infra*, and not in Paroch' *Et Warda prædict'*, and so

so found by the jury; *Et ideo non habuit iudicium* Dyer 305. Pl. 58. *Quere.*

Where the executor dieth before the probate of the *will*, his executor ought not to take upon him the execution of the first testament, but the administration of the goods of the first testator, with the testament annexed, is to be committed to the executor of the executor, if the residue of the goods of the first testator (the legacies being paid) were bequeathed by his last *will* to the first executor, or to such other person or persons to whom the said residue was bequeathed, or else to the next of blood to the first testator demanding the same; and this (*Ex relatione Doctoris Drury, Judicis Curie Prerogative Cantuarien'*) is the use and custom of the said court, and agreeable to law; to which the court gave credit. Dyer 372. Pl. 8.

Although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator: the law is the same of administrators, but the heir shall not at any time be charged without express mention of the heir. Dyer 23 *sect.* 142. *Vide ante Wentw.* 34.

Administrator sells a term; some years after an executor appears, and made oath in the archbishop's court, that he never heard of the testator's *will*, and renounceth, and the sale of the term was adjudged void; for the granting of administration by the ordinary is void where there is an executor named. But this may be inconvenient; for then it cannot be safe to purchase under an administrator. 2 *Mod. Rep.* 146. *Abraham* against *Cunningham.* *Vide post.* p. 147.

The

The archbishop shall grant administration of the goods of one dying intestate beyond sea. *Rolls* 908.

Administration granted by a commissary being a bachelor at law, and not a doctor of law, is good notwithstanding the statute of 37 *H. c.* 17. which is in the affirmative, that doctors of the civil law may be commissaries though they are married, but is not in the negative that no other be commissaries; and if a bachelor could not be commissary, yet acts done by him as commissary are good till avoided by sentence: and the court held, that if letters of administration be granted to one, and after granted to another, by this the first are not avoided, except by judicial sentence. *Cro. El.* 315. *Hill.* 36 *El. Prat. v. Stocke.*

If an appeal be to judges delegates to repeal the probate of a *will* in an inferior diocese, they may examine the appeal, and repeal the sentence for the *will*, and adjudge he died intestate, but cannot grant administration to whom it belongs, but that must be done by the king. *Bulstr.* 2, 3, 4. This is intended where there was a former appeal to the archbishop; so if after such appeal to the delegates, there had been a further appeal to the king in the court of chancery, by the statute of 25 *H. 8. c.* 19. and the *will* had thereupon been also disproved, the administration is to be granted of the intestate's goods by the king. *Mich.* 24 *Eliz. in Banco. Godbolt.*

Brown made his *will* in writing, and constituted *D.* and three others his executors in trust for *M. B.* an infant, and died; administration with the *will* annexed was granted to *D.* one of those

those executors, *D.* by his *will* makes the plaintiff his executor and dies, and administration with *Brown's will* annexed is granted to *Munn* the defendant during the minority of the said *M. B.* and to the use of *M. B.* and *Munn* puts in a caveat against the plaintiff's proving the *will* of *D.* until *Munn*, by force of a commission granted to him, had appraised the goods of *D.* and had inspected all his books, papers and writings; the plaintiff appealed to the delegates, where *Munn* put in his allegations; and all this matter being suggested and read in *B. R.* a *Mandamus* was prayed and granted to compel the judge of the prerogative court, that the plaintiff might prove the *will* of *D.* *Raymond* 236, 237. See *F.N.B.* 200. That a writ lies to compel the mayor of *Oxford*, or any ordinary, to prove a *will*.

Administrator of *J. S.* brought debt upon a bond and obtained judgment, and afterwards the administration is revoked, yet the plaintiff proceeded and took the defendant in execution: by motion the defendant was discharged, and the execution was void; for when the ground of his suit is overthrown, *viz.* his commission, he hath no authority to proceed further, and the execution issued without warrant, 1 *Brownl.* 91. *Barnehurst and Yelverton. Yelv.* 83.

Administrator releaseth all actions, afterwards the administration was revoked and declared void by sentence; the release is void. *Tbrockmorton and Hobby.*

Admi-

Administrator, during the minority of an executor shall be named administrator of the goods of *T. C.* during the minority of the executor of the said *T. C.* late executor of *E. C.* and shall not be named administrator of the goods of *E. C.* not administered by *T. C.* But had the infant been defendant, he should have been named but executor of the executor, for the rest follows, but the committing of administration is of both. *Hobart* 246. *Norton's case*.

An action was brought against the defendant as administrator during the minority of *J. S.* and the plaintiff shews in his count, that the said *J. S.* at the time of the writ was, and yet is, under the age of 21 years; and verdict *pro Quer.* But judgment was arrested, for the declaration was insufficient, because the administration ceaseth at 17, so that he may be 18, 19, or 20 years of age, and yet the administration ceaseth, and so doth the action against such administrator, according to the resolution in *Pigot's case*. 2 *Brownl.* 247, 248. *Brownhead and Spencer*.

Lake declared as administrator of *N.* during the minority of the exexecutor of *N.* (with the will annexed) brought debt upon a bond made by the defendant to *N.* but did not shew in the declaration expressly, that such administration was committed to the plaintiff, and he brought in court *Literas Testamentarias*, not saying, *Literas Administratorias*. After verdict judgment was given for the defendant, because the plaintiff had not well entitled himself to this action; and it was resolved, that this was not aided by
any

any statute of jeofails, though after verdict.
T. Jones 193.

In debt on a bond against *J.* and his wife as administratrix, the defendant pleads payment by the wife after the intestate's death, and on that issue found *pro Quer'*. Judgment was, *Quod recuperet Debitum* against them *De bonis Testatoris, & si non, &c.* the damages, *De bonis propriis. Per Curiam*: The judgment is well given.

1. Although the plea be false, yet he is altogether a stranger to the testator, and therefore the judgment shall be only *De bonis Testatoris*, as where he pleads fully administered, which is false in his own conscience. 2. Although the wife hath not any goods during the coverture, yet because the husband is only charged in respect of the wife, and she might have goods if she survived, and execution might be taken against her, the judgment is good. *Cro. Jac. 191. Johns and Adams, Mich. 5 Jac. B. R.*

A prohibition was prayed to the admiralty (among other reasons) because a suit was brought there by the husband as administrator of his late wife, who died intestate, who was executrix of *J. S.* her first husband, upon a stipulation of 200*l.* penalty made to *J. S.* whereas that suit should be by the administrator of the goods of *J. S.* not administered by his late executrix, and the proceedings in the admiralty were stayed by the consent of the executrix's second husband, who was plaintiff in the admiralty. *Hardres 473.*

I will that *W.* shall be my administrator, or have administration of my goods with *N.* my executor: by this *W.* and *N.* are joint executors. 21 *H. 6. 6. vide ante Wentw. p. 9.*

A. is

A. is cited to prove the *will*, and does not come in, and administration is granted to *N.* of *B.* if after *A.* proves the *will*, the administration granted to *N.* immediately ceaseth; but all lawful acts done by *N.* before such probate binds *A.* and yet if administration had been granted to *N.* without citing the executor to prove the *will*, or before the time given to *A.* to prove it, then no act of such administrator would bind the executor. 3 *H.* 7. 14.

Vide *Flow. Com.*
281. b. 9 *Rep.*
37. b. *Hensloe's*
case.

Sir *T. H.* was possessor of divers leases, and had issue *W.* and *T.* his sons, and makes *W.* his executor, and dies, and his *will* run thus: *All the residue of my goods, debts and legacies being paid, I give to my executor. W.* marries, proves the *will*, and makes election to have a tenement parcel of the demesnes, as legatee, and dies intestate before debts paid; the wife of *W.* shall have the administration, and not *T.* the son. So if executor die before probate, his executor may not take upon him the execution of the first testament, but administration ought to be delivered to him to whom the goods are bequeathed, otherwise to the next of blood. 2 *Roll. Rep.* 158. *Hinson and Button*, 372. a. *W. Jones* 225.

Audita Querela, an administrator recovers damages in an action of *Trover* and *Conversion* for goods of the intestate taken out of the possession of the administrator himself, then his administration is revoked; and the question was, whether he shall have execution of the judgment, notwithstanding the revocation of his administration? *Saunders*: I conceive he cannot, for the administration being revoked, his authority is gone. *Dr. Drurie's case* in the 8th *Rep.* is plain, and there's a precedent in the new book

book of entries 89. *Barrel*: I conceive he may take out execution, for it is not in right of his administration; he lays the conversion in his own time, and he might in this case have declared in his own name; and he cited and urged the reason of *Packman's* case, 6 *Rep.* 18, 19. and *Cro. Eliz.* 460. He might bring the action in his own name, but the goods shall be assets. If goods come to the possession of an administrator, and his administration be repealed, he shall be charged as executor of his own wrong: now in this case the administration being repealed, shall he sue execution, to subject himself to an action when done? *Twisden*; I think it hath been ruled that he cannot take out execution, because his title is taken away. *Judgment per Cur' versus Defendentem.* 1 *Mod. Rep.* 62. *Turner & Davies.*

It hath been said, that executors could not waive a term, (though if they could they ought to plead it specially) for it is naturally in them, and *prima facie* is intended to be of more value than the rent; if it should fall out to be otherwise, the executors shall not be liable *de bonis propriis*, but must aid themselves by special pleading. *Mod. Rep.* 16. *Anonymus.*

The plaintiff had judgment in debt against *John Brooks* the intestate, and took out a *Fieri facias* bearing date the last day of *Trin.* term, *de bonis & catallis* of *John Brooks*; before the execution of which writ *John Brooks* dies, and *Eliz. Brooks* administers, the sheriff's bailiff executes the writ upon the intestate's goods in her hands. Upon this, serjeant *Baldwin* moves the court for restitution; for that a *Fieri facias* is a commission, and must be strictly pursued.

Now

Now the words of the writ are, *de bonis* of *John Brooks*; and by his death they cease to be his goods. The plaintiff will be at no prejudice; the goods will still remain liable to the judgment, only let the execution be renewed by *Scire facias*, to which the administratrix may plead somewhat. *Wyndham*: The property of the goods are so bound by the teste of the writ, as that a sale made of them *bona fide* shall be avoided; and since the intestate himself could not have any plea, why should we take care that the administrator should have time to plead? And of that opinion was all the court, after they had advised with the judges of the King's Bench, who informed them that their practice was accordingly. But *Vaughan* said, that in his opinion it was clearly against the rules of law. But they said there were cases to this purpose in *Cro. Car. Rolls. Moor*, and 1 *Modern Rep.* 188. *Farrer and Brooks administrator of Jo. Brooks.*

But by the 29 Car. 2 the goods are only bound from delivery of execution to the Sheriff, which Stat. was made in favour of creditors; therefore as to the party they are bound from the teste still.

It was settled in the case of *Sir John Parsons v. The executors of Gill*, *Easter T. 13. W. 3. B. R.* That the writ of *fieri facias* being tested in the life-time of *Gill* might well enough be executed upon the goods that were in the hands of his executors, because by the teste of the writ the property of the goods is bound against all persons but purchasers. Judge *Blencow's M. S. Rep. fol. 196.*

The same point, as against the party was also settled in *Doctor Needham's case. Easter T. 3. W. & M. B. R.*

A man dies leaving issue by two several venters, *viz.* by the first three sons, and by the second two daughters; one of the sons dies intestate, the elder of the two surviving brothers

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takes out administration; and Sir *Lyonel Jenkins*, judge of the prerogative court, would compel the administrator to make distribution to the sisters of the half-blood. He prayed a prohibition; but it was denied upon advice by all the judges; for that the sisters of the half-blood, being a-kin to the intestate, and not *in remotiori gradu*, then the brother of the whole-blood, must be accounted in equal degree. 1 *Mod. Rep.* 209. *Smith's case*

Debt upon an obligation against an administrator; the defendant pleads a statute acknowledged by the intestate to the plaintiff, which statute is yet in force. The plaintiff replies, that it is burnt. The defendant demurs, and by the opinion of *Wyndham*, *Atkins* and *Ellis*, against *Vaughan*; the plaintiff had judgment. 1 *Mod. Rep.* 186, 187. *Buckley v. Howard*.

A great inconvenience would ensue, if men were allowed to administer as far as they would themselves, and then to set up a beggarly administrator; they would pay themselves their own debts, and deliver the residue of the estate to one that's worth nothing, and cheat the rest of the creditors. If an administrator bring an action, it is a good plea to say, that the executor made by the *will* has administered. 1 *Mod. Rep.* 213. 214. *Parten and Baseden's case*.

An executor's refusal before the ordinary after administration, is a void act. 1 *Mod. Rep.* 213. *Parten and Baseden's case*. *Vide ante Wentw.* p. 37, 38.

Administration was granted to the sister of the half-blood of the intestate, and her husband, by the prerogative court, and the brother of the whole-blood sued there to have the letters repealed;

pealed; and upon motion for a prohibition, upon this suggestion it was agreed by the court, that the sister of the half-blood is in equal degree of kindred with the brother of the whole-blood within the statute. And so it was resolved, 1 *Car.* between *Glascock* and *Wingate*, known by the name of justice *Yelverton's* man's case. And if the ordinary hath once executed his power according to the statute, he cannot repeal the letters upon a citation; but it was resolved, that the statute was not observed in the grant of the letters in this case, because the husband who is not of kin to the intestate is joined with the wife; and if she should die before him, he should continue administrator against the meaning of the statute. And for this cause a prohibition was denied; but it was said, that if it had been granted to them only during the coverture, perhaps it might have been good, because the husband might have administered during the coverture, though it had been granted to the wife only. *Select cases* 36. *Brown* and *Wood*.

Executors shall be intended consant of all contracts of the testator, as well contingent as certain. *Select cases* 38. *Ecles* v. *Lambert*.

Executors where chargeable in the *Debet & Detinet*, where in the *Detinet* only. *Vide Select cases* 43. *Roston* v. *Cordrye*.

In an action of debt brought by an administrator the plaintiff declares of letters of administration granted to him *per Carolum Regem, &c.* without saying *debito modo, &c.* and upon a demurrer to the declaration it was adjudged good, because the king hath universal jurisdiction here. *Select cases* 53. *Hobson* v. *Wills*.

Letters of administration of the goods of Sir *John Lamb* intestate, were committed by the prerogative court to the wife of *Hill*, being near to the intestate; and upon a suggestion of a suit there, by others of equal degree, for a distribution of the goods of the intestate, according to agreement made by the administrator, as was pretended. *Hale* prayed a prohibition, and it was granted; for the statute *wills*, that administration be granted to the next of kin, for their advantage; and when the ordinary, &c. hath once executed his power according to the statute he cannot alter it, nor hath any power to compel the administrator to make distribution notwithstanding the agreement. And *Hale* said, That the court there threatened to repeal the letters granted, unless she would bring in a true inventory of the estate of the intestate, and give a true account of her administration; to which *Roll* answered, That the court there may cite her to bring in an inventory, and to give an account; but if it appear that they go about to repeal the letters for not doing it, you shall have a prohibition, which was not denied by *Bacon*. And *Hale* would have had a prohibition against all the cousins, as well those that sued there as others; because the proceedings there being *ore tenus*, the rest may join in the suit when they will, but the court denied to grant any prohibition, *Quia timet*, &c. *Select cases* 56. *Hill & Uxor v. Bird, & alios*:

Where part of the arrears demanded were due in the time of the testator, and part after his decease, the action in the *Detinet* was good for the whole, as well as if all had been due after the death of the testator. And that after

a verdict *Quod non Detinet*, the land shall not be intended of any value, as it is well known in these times, in many places, lands have been of no value, and yet the executor is liable as to the rent as far as he hath assets, and clearly if he hath assets he cannot wave his term. *Select cases* 76. *Cornish v. Cowsey*.

Debt against administrator, the point upon demurrer by the defendant was, whether the plaintiff ought to shew the name of him who granted administration to the defendant. *Seis*, who demurred, cited *Cro. Jac.* 10. *Case de Wade & Atkinson*, 11 H. 4. 71, 72. *Vet. Intrat.* 300 and 302. *Cur.* The allegation by the declaration that administration was committed to the defendant *Debita juris forma* sufficeth, without shewing by what ordinary. *Judgment pro Quer.* *Sir Tho. Jones* 1. *Therold v. Baily*.

The defendant pleaded administration committed, and that he retained for satisfaction of a debt due to him by obligation; upon which the plaintiff demurred, and shewed, that it doth not appear that administration was committed to the defendant, and then he had no colour to retain. *Judgment pro Quer.* for the plea is insufficient. *Sir Thomas Jones* 23. *Caverly v. Ellison*.

The plaintiff declared as administrator during the minority of six, and sheweth that five were under seventeen, and that the sixth had attained eighteen. The defendant demurred. *Foster pro Quer.* the declaration is good notwithstanding the case of *Pigot, & Co.* 29. For that case was adjudged according to the usage of the judges of the spiritual law then in use, but now by the Stat. of 22 & 23 Car. 2. cap. 11. the law is altered in this point, and no administration

Pl. 1 Jac. in Cam. Scacc.
Judgment in debt against an administrator reversed, because he does not shew by whom administration was committed, for he may as well take conscience by whose means he is administrator, as that he is so.

Cro. Jac. 10. pl. 13.

may be granted, but to persons of the age of 21 years; for the statute requires bond to be given by the administrator, which may not be by an infant. *Cur' contra.* The administration is determined, and the statute hath not altered the law in this point. *Judgment quod nil capiat per billam.* *Sir Thomas Jones* 48. *Joyner v. Watts.*

Post. 155.

Administration granted before the renunciation of the executor, although he renounce after, the renunciation shall not make the administration good by relation, for it was void, not voidable only. *10 Co 62. a. Sir Tho. Jones* 73. *Abraham v. Cunningham.* *Vide hic ante* 135.

Vide ante 158.

Upon a *Scire facias* out of the chancery against the defendant as administrator for 800 l. debt due by his intestate, upon a recognizance acknowledged before *Sir John Keyling*, chief justice of the King's Bench; it was returned, that by inquisition it was found, that the defendant had wasted the goods of the intestate, and converted them to his own use to the value of the said debt; upon which the defendant appeared and traversed that he had wasted, and issue joined thereupon, and a special verdict was found to this effect, that before administration committed to the defendant, *John Hope* took into his hands all the goods of the intestate (*ultra* 220 l. value) and had disposed and converted them to his own use. That the defendant after administration, sued the said *Hope* for recovery of the goods, or the value of them, and pending the suit; the defendant and *Hope* covenant mutually by articles sealed by each of them. 1. That the said *Hope* should deliver all the goods not sold by him in *Specie* to the defendant, &c, and the defendant covenanted that he would defend

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at his costs all suits, and save *Hope* indemnified against all judgments and damages upon the said suits; and moreover it was found that *Hope* had not paid any money covenanted to be paid to the defendant, and that the defendant for non-payment had sued the said *Hope*, and arrested him, and that he was yet in custody upon the said suit; and moreover that the defendant had wasted the said goods to the value of 220 *l.* but as to the residue of the goods due, which *Hope* himself had possessed, the advice of the court was prayed; and the question in law was, whether the defendant by these articles had made himself liable to a *Devastavit* for the money not paid to him; and after divers arguments, it was resolved by the court, that it was a *Devastavit*, and that the administrator shall be charged, for the property of the goods was changed by this agreement, for the defendant had accepted of the said covenant, for the goods which operated as a sale by him, and otherwise *Hope* shall be twice charged, and it was the folly of the defendant to make such contract. And judgment was given for the plaintiff. *Vide Yelverton, fol. 10. Case de Goring, and Sir Tho. Jones 89. Norden v. Levett.*

Debt upon obligation by an administrator, *durante minore ætate* of an executor *cum testamento annexo*; the plaintiff declared, naming himself as aforesaid, but did not shew in the declaration that administration was committed to him; but *profert Literas Testamentarias*, without saying, *Literas Administrationis*; after verdict for the plaintiff, *Pollexfen* moved in arrest, that the plaintiff had not intitled himself to the action,

Administrators.

for that he had not alledged that administration was committed to him, *Witbins*. After verdict it is aided by the late statute of jeofails. *Cur^a contra*; and judgment, *Quod nil capiat per Billam*. *Sir Tho. Jones 193. Lake v. Thacker*.

Debt against administrator or executor upon a *Devastavit*, there must be a judgment too to ground the action. *Calthrop 2. Burrel v. Richmond and his Wife, administratrix of Jonathan Bennet*,

Hughs administrator of *Charles Hughs* of *London* deceased, is plaintiff in a prohibition, and sets forth his case upon 21 H. 8. and that the intestate was posselt of goods and chatels to the value of 12000*l.* and died the 10th of *March*, 1666, and the 10th of *April* after, he having *Bona notabilia*, administration was committed to his son the plaintiff. That the plaintiff being administrator did give bond with sureties, and that for true administration the bond is still in force, and he saith all the goods do belong to the person that is administrator; and that he the administrator ought to have the full and sole power to dispose the goods, and the remainder to himself; and he saith, he being no ways compellable by any law to come to any distribution of those goods, he was yet called into the court Christian by the defendant his sister, daughter of the deceased. To this the defendant pleads, she did not prosecute after the prohibition, and for a consultation she takes by protestation, that the plaintiff is not to have the goods solely. For plea she saith, that when any person dies intestate, and administration is granted, the administrator

ministrator is to render accompt; and of the surplufage, by the ancient law of the kingdom, to allow ever child a reasonable portion; and that there remains of *Dr. Hughs*, her father's estate, 3000 *l.* unadministred, and she being a daughter unadvanced doth call upon her brother for a share into the Ecclesiastical Court; and upon this he demurs.

Debt against executors; the executors plead judgment, and no assets *ultra*. The plaintiff replies, they are kept on foot by fraud. The defendant saith, he did not keep the judgments on foot by covin; and because he saith not, *nor any of them*, adjudged naught. *Calthrop* 192. *Richfield and Uxor v. Udal*.

The testator by obligation was bound to the plaintiff in 40 *l.* to be paid upon demand, and that he required the testator in his life-time, and the defendants, since his death to pay, and that they have not paid it. The defendants plead several pleas; *R. H.* pleads in abatement, that *Sir Andrew Corbet* died intestate, and that the bishop granted to him letters of administration, and saith, that he was never executor, but administrator, and demands judgment of the writ. To this it is demurred, because he doth not shew the letters of administration. The other two defendants say, fully administred on the 27th day of *March*, 1664, and that before the said 27th of *March*, they had no notice of this action brought by the plaintiff, and that from and after that time they had not assets. Upon this the plaintiff demurs, and after divers arguments judgment was given for the plaintiff. *Calthrop* 227. *Mellor v. R. H. Mary Overton & W. H. executors to Sir Andrew Corbet*.

Title

Title being made to a term by one as administrator, and no administration produced, the book of the ecclesiastical court where it was granted being produced, in which was entered the act or order of the court for granting of it, it was allowed good evidence; and *Twisden* said, that so it was in the case of the Earl of *Manchester*. 1 *Levinz*. 25. *Garrett v. Lister*, *Vide* 135. *post*.

By *Twisden* and *Wyndham*, justices, it was held, that where a man dieth intestate, having goods in several peculiars, that the granting of administration doth not belong to the ordinary of the diocess but to the metropolitan of the province, for they are exempt from the ordinary jurisdiction. 1 *Levinz Rep.* 78. *Vide ante Wentw.* p. 46.

Debt for rent as administrator, the defendant pleaded, that administration granted to the plaintiff was *Debito modo* revoked and granted to *J. S.* The plaintiff replied, that he was next of kin to the intestate, and that he had sued an appeal from the said sentence; and after divers arguments in several terms, it was agreed by *Kelyng* and *Twisden*, that administration might be revoked for just cause, as if it were unduly granted contrary to the statute at first, or if the administrator afterwards became disabled by lunacy; but it was adjourned, and long depended. But afterwards *Levinz* saith (as he heard) judgment was given for the plaintiff, because by the appeal the sentence of revocation was suspended. 1 *Levinz* 157. *Price v. Parker*.

It was agreed by all the four judges in the King's Bench, that where the ordinary hath granted administration according to the statute, that he may not revoke it without cause, because the grantee hath an interest in the goods by the statute, which the ordinary may not take from him without cause; but for good cause it seemed to them all that he might, as if the administrator become lunatick, &c. and *Morten* and *Wyndham* said, that the granting pending the *caveat* was cause to revoke it. And they said, that the judges delegates are the proper judges of what validity the *caveat* shall be according to their law; and it seemed to them, that it is as a superseas in our law, and that as judgment given after it in our law, is erroneous; so it is in their law after a *caveat*: But be it so or not, it is to be adjudged by the delegates, who are the proper judges of this matter ecclesiastical which belongeth to their courts, and not to this court, which is not apprised of their forms and manner of proceeding. And for that cause they held the prohibition ill granted, and that a consultation ought to be granted: But the court being divided it remained as before as to the prohibition. 1 *Levinz.* 186. *Offley v. Beets.*

Administrator *De bonis durante minore etate* J. S. obtained judgment, and in a *Scire facias* against the bail he pleaded that J. S. was now of full age; upon which the plaintiff demurred, and adjudged no plea. For this recognizance is to the plaintiff himself by name; although that he had the administration *durante minore etate*

etate tantum, and the coming of the infant to age shall not hinder the plaintiff to sue the *Scire facias* against the bail. But by *Hale*, if he had taken execution upon the principal judgment, after the infant came to age, it had been a doubt, whether it ought to be sued by him, or by the infant. 2 *Levinz* 37. *Embrin v. Mompeffon*.

Where administration granted to the next of kin, when there is residuary legatee, is revocable or not. See 2 *Levinz Rep.* 55. *Thomson v. Butler*.

It was said by *Hale*, and by none denied, if a man die having goods in the several provinces of *York* and *Canterbury*, several administrations ought to be committed, and so it is if in *England* and *Ireland*. 2 *Levinz* 86. *Shaw v. Stoughton*. *Vide ante p.* 46. *Wentworth*.

Administration was granted, and the administrator possessed of a term by virtue of it, and made a lease, then came a citation to repeal this administration; and it was affirmed, of which sentence of affirmation there was an appeal sued, and the sentence of affirmation was repealed, and the first administration repealed, and administration granted to another. By *Hale*, & *totam curiam*, this new administrator shall not avoid the lease made by the first administrator; for that is no more than a repeal of the sentence in the citation, and so of the nature of the suit in the citation, and so is all one as if the first administration had been avoided in the suit upon the citation, and not as if the appeal had been brought originally upon the first administration, by which it had been totally annulled. 2 *Levinz* 90. *Semine*

90. *Semine v. Semene. Co. 6 Rep. 18, 19, Packman's case.*

In a prohibition the case was, a man died intestate having *A. B. and C.* brothers of the whole-blood, and *D. E. and F.* of the half-blood; administration is committed to *A.* and the ordinary would bind him to a distribution equally between all of the half-blood, and the whole-blood; and it was argued at bar in several terms, and for the prohibition it was said, that of acts of parliament the judges of the common law ought to judge, and the half-blood is not regarded at common law, nor may they be heir the one to the other, nor may the testator or intestate be presumed to have so great affection to the half-blood as to the whole-blood. Therefore it is not reason that the ordinary should give him equal part of his estate; and the statute law being silent, whether the half-blood be of kin, but only appoints the division to be between the kin of equal degree, it ought to be determined by the common law, which is of kin, and which is the equal degree; and by them were cited *Fitz. Devise 9. 2 Rolls 303.* And for the consultation it was said, that this statute being for distribution of things testamentary only, it ought to be expounded by their law; and the brother of the half-blood is brother, as well as the brother of the whole-blood, and of that our law taketh notice. Ergo, the brother of the half-blood may be guardian, as *Owen 128. Cro. Eliz 825. Swan v. Gatland*; and the statute is, that they ought to distribute according to the law in force; and our law doth not

Cro. El. 825. Swan v. Gatland, Pas. 43. El. C. B. The brother of the half-blood had the guardianship, being the nearest mother's brother.

of kin to whom the inheritance could not descend before the
men-

mention any distinction. *Ergo*, the law in force ought to be intended the canon law; and they cited also 2 *Rolls* 303. and *Styles* 74, 75. and *Trin. Ter.* 29 *Car.* 2. it was said at bar, that the ecclesiastical court doth give to the half-blood half shares, which *Rainsford* and *Wild* held reasonable; and afterwards, *Mich.* 29. consultation was granted, but *Quer'* If generally or with an *Ita quod*, they give half share to the half-blood; for always afterwards it was their constant practice to divide equally between the half and whole-blood, and that hath been approved in the courts of *Westminster* since. 2 *Levinz* 173. *Tracy v. Smith.*

Vide hic ante
135. 147.

The ordinary granted administration where there was a *will* and executors, although it was concealed, void and not made good by the renunciation of the executor afterwards. *Levinz Rep.* 2 part 182. *Abraham v. Conningham.*

Debt for rent by the lessor against the administrator of the lessee, he pleaded, that before the rent due he had assigned the term; upon which the plaintiff demurred, and after divers arguments it was adjudged for the plaintiff; for the privity of the contract continued between the lessor and the administrator of the lessee, as it was between the lessor and lessee themselves; and it is not contrary to *Overton* and *Sidal's* case, cited in *Walker's* case, 3 *Co.* 24. and in *Pop. Rep.* 120. *Cro. Eliz.* 555. and *Windham* said, that an executor may not waive a term so, but that he shall be charged for the rent if he have assets; for he is obliged to perform all contracts of the testator if he hath assets, be the rent above the value of the land or not, which was not denied;

nied; and *Kelyng* said, he may not so waive, but that he shall be charged in the *Detinet*, upon which the assets will come in question; and if he continue in the possession he shall be charged in the *Debet & Detinet*, in respect of the perception of the profits, hath he assets or not, to which *Twisden* agreed. 1 *Levinz* 127. *Helier* versus *Cafebert*.

Debt for rent as administrator of an administrator of a lessee for 30 years, who demised to the defendant for 20 years rendering rent; and that the first administrator had paid debts of the first intestate to the value of the term; upon which the defendant demurred, because the plaintiff did not shew that the first administrator had paid the debts with his own proper money, and it might be that he paid them out of the money of the first intestate; for which the court held the declaration ill; but it being moreover declared, that he chose and took the term in satisfaction, the court held it a strong implication, if not a plain averment, that he paid them with his own proper money; and afterwards judgment was given for the plaintiff.

1 *Levinz* 154. *Baker* v. *Berisford*

Debt as administrator against the defendant, lessee for years for rent, and counts of a lease made to the intestate, and he being possessed demised to the defendant rendering rent, and brought the action in the *Debet & Detinet*; and the defendant pleaded, that the intestate before the lease to him had assigned his term, and traversed that the intestate was possessed when he demised to the defendant; issue upon it, and verdict for the plaintiff, and it was moved

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in arrest, &c. That the declaration by an administrator in the *Debet & Detinet* lieth not, for although that in debt against an administrator he shall be charged in the *Debet & Detinet*, as *Hargrave's* case is in respect of his possession, yet in an action by an administrator of a man who had a term and made a lease and the reversion goes to the administrator he shall sue for the rent in the *Detinet tantum*, because all *that* which he shall recover shall be assets; but where the executor is sued, he, in respect of the possession and profits of the land taken by himself, shall be charged *De bonis propriis*; and so the court held, that the declaration was not good, but it is help'd by the verdict by the Stat. *de Jeofails* made at *Oxford*. *Levinz* of council for the defendant. 1 *Levinz* 250. *Frevin & Uxor v. Peynton*.

Assumpsit upon a promise of the testator for 1000 *l.* the defendant pleaded a recognizance in chancery for 2000 *l.* and several judgments against himself after exhibiting the bill, and pleaded payment of them severally, and pleaded several obligations to several persons, and payment of them after exhibition of the bill, and that he had fully administrated, and that he had not at any time after the bill any goods, except *Bona ad valentiam* of the several sums paid upon the several judgments and obligations *Et præterquam bona ad valentiam 5l. que onerat' existant' & non sufficiunt ad satisfaciend' le recognizance*. The plaintiff replied, *Protestando*, that the judgments were had by fraud and covin; *pro placito* he said, that the defendant paid not the money upon the said judgment to *A.* nor upon the said judgment to *B.* & *sic de cæteris*; and

and in like manner he pleaded non-payment severally of the said several sums upon the said several obligations, omitting some, *Et de hoc ponit se super patriam*. And as to the recognizance it was satisfied and kept on foot by fraud and covin, upon which the defendant demurred; and now he excepted to the replication.

1. Because it was double and manifold, putting all matters in issue where non-payment of *one* would have made an end of all, but *Non allocatur*, for the plaintiff hath election to traverse one only, or every one; for he might be mistaken in one, and therefore it is good to traverse so many of the matters as he pleaseth; and so it was done in *Treching's*, case, and *Turner's* case 8 *Co. Rep.* and all presidents are so. 2. The pleading *Non solvit* to the one, nor to the other, *&c.* then *Et de hoc ponit se super patriam* is good, for they are several issues under the *Et de hoc ponit se*, *&c.* and not one multiferous issue, as was objected. 3. The omission of pleading to some of the sums paid upon the obligations hurts not; for he may plead to as many of them as he pleases and omit the others. 4. Although that he mistook some of the sums to which he pleaded *Non solvit*, it hurteth not; for it is no more than if he had said nothing to them; and judgment was given for the plaintiff. 1 *Levinz.* 281. *Jeffries v. Dee, Administrator de Everard.*

Assumpsit, and called herself administratrix of *J. S.* and declared, that the defendant was indebted to her 300*l.* but did not say indebted to her as administratrix; but then declared of another debt due to her as administrator: and

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that

that upon an accõpt between them, the defend-
 ant was found indẽbted to her other 30 *l.* and pro-
 mised to pay the same; and upon *Non Assumpsit*, a
 general verdict, and entire damages, upon which
 it was moved in arrest of judgment, that the first
 promise is, and ought to be intended of a debt
 due to the plaintiff *in proprio jure*, although that
 she named herself administratrix, & *in fine nar-*
rationis, produced the letters of administration,
 yet it was only to warrant the second account
 which is *in jure intestati*. To which it was
 answered, admitting the first promise to be
in jure proprio, yet the last being upon an ac-
 cõpt with herself, and the promise was to
 herself in her own time, they may well be join-
 ed in one declaration; and one general verdict
 and entire damages also might well be intended
 after verdict, that the first debt was due to her
 as administratrix, although that it was not so
 expressly said; and judgment given for the plain-
 tiff. *Twisden Totis Viribus e contra. 2 Levinz*
 110. *Curtis v. Davies.*

Debt for arrears of rent as executor, and also
 as administrator, *durante minore ætate* of his co-
 executor; and declared, that the testator made
 the plaintiff and the other co-executors, and
 that *J. D.* seised of a rent of 20 *l. per Ann.* de-
 vised it to three persons in equal parts in com-
 mon, and that all the three devisees levied a
 fine thereof as to one moiety to the wife of
 the testator in fee, and as to the other moiety
 to the use of a stranger in fee, and that the
 stranger granted his moiety to the wife of the
 testator in fee, by whom the testator had issue;
 and the wife died; whereupon the testator was
 seised

because his assent or attornment is not requisite for the perfection of these conveyances. 2. Where one of the executors is an infant, and may not prove the *will*, administration *durante sua minori etate* may be granted to the other, who alone shall bring the action; and it is not inconsistent that he shall have the administration in such case; for that it is not granted as upon one dying intestate, for the *will* is proved, but only to enable him to sue alone; because that the other is not capable of proving the testament, and so not to join with him, and he may not sue alone. 2 *Levinz* 239, 240. *Colborne v. Wright*.

Assumpsit against defendant as administratrix to her husband for 20 *l.* 10 *s.* the defendant pleaded that the intestate was bound in a statute of 2000 *l.* to *Cordel*, *pro vero & justo debito minime soluto*. The plaintiff replied, that *Cordel* sued an extent and *Liberate* upon the statute, and had lands delivered and accepted by him, and the return of the writ *prout patet per recordum*. The defendant rejoined, that the sheriff who returned the writ was removed from his office, by which the return was void. The plaintiff demurred generally, and had judgment; for *per Cur' Cordel*, by accepting the lands upon the *Liberate*, was concluded to have other execution against the goods of the dead, and so the administratrix is not chargeable upon the statute. *Fitz. Execution*, 84. 2 *Cro.* 694. and 15 *H.* 7, 15, 16. *Deleham's case*. And this very point was resolved lately in the Court of Common Pleas, between *Johnson* and *Young*, for the presumption, that by the acceptance of the lands the statute is satisfied; and as to the plea, that the
sheriff

sheriff was removed before the return, it is contrary to the record, and not receivable; for which the plaintiff had judgment. 3 *Levinz*. 269. *Barker v. Dye, Administratrix of Dye; Pas. 2 W. & M. in C. B.*

Gale had judgment in the Common Pleas after verdict against *Till* an administrator, who brought a writ of error thereupon in *B. R.* where the judgment was affirmed. And the question there was, whether the plaintiff in the action should have costs upon the affirmance of the judgment in the writ of error, upon the *Stat. 3 Jac.* and that he ought to have costs were cited 1 *Cro. Atky v. Herd. & ibid. Peccass's case, Hut. 78, 79. Latch. 221.* this bringing of the writ of error being his own act. *Cur' semble*, no costs should be. For they shall not find bail upon the writ of error upon the same statute; but they would advise. *Levinz*, of council for the plaintiff in the original action, was satisfied with the opinion of the court, and did not move it further. 3 *Levinz* 375. *Gale v. Till.*

Debt upon obligation against the defendant as heir, who pleaded that administration to the ancestor was committed to *I. S.* who had taken administration, and had' assets. The plaintiff demurred, and upon argument had judgment; for the plaintiff hath election to sue the one or the other. 3 *Levinz* 189. *Davies v. Churchman, 36 Car. 2. C. B.*

Debt against the defendant administrator, and declares upon a demise to the intestate for 125 *l.* due in the life of the intestate in the *Detinet*, and for 64 *l.* in his own time in the *Debet &*

Vide 1 *Lev.* 13, 26, 92 & 232, & *Stat. 3 & 4 W. & M. c. 14.* which is for relief of creditors against fraudulent devises.

Vide 1 *Sid.* 266, 342. 1 *Lev.* 128, 130, 224, 250. 2 *Lev.* 80. 2 *Jo.* 169. *Cro. El.* 711. *Lev. Ent.* 10, 52.

840. *Cro. Jac.* 238, 549. *Cro. Car.* 225. Vide *De-*
F 2 3

See 1 Wilson
171, 172.

Detinet. The defendant demurred; and adjudged the action did not lie to charge him in the *Detinet* for part, and the *Debet & Detinet* for the other part, which requires several judgments; *scil.* *De bonis propriis* for the arrears in his own time, and *De bonis intestati* for the arrears due before his death, and the severing of the said sums in the declaration is not sufficient, but he ought to have several actions. 3 *Levinz* 74. *Salter v. Cobbold administrator, Mich.* 34 *Car.* 2. in *C. B.*

Scire facias against the defendant as administrator of *Mary Sachwell*, against whom the plaintiff had obtained a judgment for 1700 *l.* and 5 *l.* damages, as administratrix to *Henry Sachwell* her husband, *De bonis predicti Hen Sachwell si tant' &c. & si non tant'. &c. dampna de bonis suis propriis*, and suggested that *Mary* had goods sufficient of *Henry*, but that she had wasted them. The defendant pleaded, that *Mary* had fully administered the goods of *Henry*, and traversed the *Devastavit*, and *quoad* the 5 *l.* for the damages pleaded payment to the plaintiff by *Mary Sachwell*. The plaintiff *quoad* the first plea maintained the waste, and thereupon issue, and *quoad* the 5 *l.* pleaded *Non solvit*, upon which also another issue. The jury *quoad* the last issue found for the plaintiff, that *Mary* paid not the 5 *l.* and *quoad* the first issue as to 314 *l.* 1 *s.* 5 *d.* that *Mary* had wasted; and they further found, that before the marriage between *Henry* and *Mary*, *Henry* covenanted with *Henry Norwood* to leave to *Mary* at his death 1000 *l.* and gave to *Norwood* an obligation for 2000 *l.* for performance of it; and that after marriage *Henry* died

died indebted to the plaintiff the said 1700*l.* for money had and received to his use, and afterwards died, and administration of his goods were committed to *Mary*; and that afterwards the plaintiff impleaded *Mary* for the 1700*l.* and obtained the judgment *supra*. And that the 1000*l.* not being paid to *Mary*, *Norwood* brought debt on the bond against *Mary* as administratrix to her husband, and recovered a judgment against her for the 2000*l.* upon the bond, of the goods of *Henry si tant' &c.* and that *Mary* by consent of *Norwood* did leave in his hands 1000*l.* of the goods of *Henry*, to satisfy the 1000*l.* due to him. But whether she had wasted the 1000*l.* or not, they pray the advice of the court. And they moreover found, that after the judgment to the plaintiff, other goods of *Henry*, to the value of 63*l.* came to the hands of *Mary*, which she paid upon debts of *Henry* due upon obligations; but whether she had wasted the 63*l.* *petunt etiam advisament' Cur'*, And upon argument it was resolved *per tot' Cur'*, That the defendant shall be charged of the goods of *Mary* for the 1000*l.* left to her own use to satisfy her 1000*l.* for by the confession of the judgment to the plaintiff she had made herself liable to it; for she might have pleaded the obligation of 2000*l.* in bar of the 1700*l.* being due upon contract to the plaintiff, which not having done, she shall be charged to pay it notwithstanding the other judgment for her proper debt. As if an administrator hath assets to the value of 100*l.*; only, and confess two judgments to two several persons for 100*l.* a-piece, she shall be obliged to pay both, as if she had given to them two several

obligations to pay them. By *Pemberton, Windham* and *Charlton*, It not being found that at the time of the judgment confessed to the plaintiff, she had notice of the obligations upon which she paid 63 *l.* she shall not be charged for the said 63 *l.* neither shall it be a *Devastavit* in her; for they held, that an executor who paid debts upon contracts, where there are debts by specialty not paid, whereof they had no notice, it shall not be a *Devastavit* by payment of the debts upon contracts, they not having notice of the specialties; but *Levinz totis viribus contra*, in this point: He agreed, that if executors pay a debt of equal nature after writ brought for another debt of the same nature, they shall be excused if they have not notice of the writ; but they may not pay a debt of inferior nature after writ brought for a debt of superior nature, have they notice of the writ or not. Nor was it at any time seen before, that want of notice of the specialty shall excuse payment of a debt upon contract. But by the other three judgment was given *ut supra*. But *Charlton* told *Levinz* afterwards, that he recanted his said opinion in this point. 3 *Levinz* 113. *Britton v. Bathurst*.

The act of the court sufficient proof of administration.

In ejectment tried at the bar, where the plaintiff made title as administratrix, and proved her administration by the act of court, by the granting of it to her; and it was admitted sufficient *per tout le court*, without shewing the grant of it under the seal of the court. 1 *Lev.* 101, *Peaslie's case. Vide p. 151. ante.*

Upon

Upon an exception taken to a declaration, that it was not good, because he declared as administrator upon letters granted *per Archidiaconum*, and did not say, *Loci illius Ordinar'*, nor *cui de jure* it belonged to grant it. The court held it good in case of the archdeacon, as well as in the case of the bishop, for the archdeacon *est oculus episcopi*; and by *Twisden* the declaration is good without saying, *Loci illius Ordinar'*, because he produced his letters of administration. Otherwise in bar. 1 *Levinz*. 193. *Dring v. Respasse*.

Debt upon an obligation against an administrator, who pleaded *plene administravit*; upon which the plaintiff prayed judgment, according to *Shibley's case*, 8 *Co.* and after brought a *Scire facias* upon assets which happened afterwards, and had judgment in *C. B.* upon which error was brought in *B. R.* and assigned in the first judgment that it ought not to have been given upon the plea of *plene administravit*, and for this *Dorchester and Web's case*, 1 *Cro. Hutton* 128, & *Rast. Entr.* 323, 329. were cited; but *e contra* were cited *Shibley's case*, & *Trin.* 13 *Jac. Rot.* 1104. & *Mich.* 13 *Jac. Rot.* 206. both in this court. *Kelyng, Rainsford and Moreton* held, that the judgment ought to be affirmed according to *Shibley's case*. *Twisden dukitavit*, and took exception, because the defendant was in *Misericordia*, where the plaintiff was not delay'd, for the plea is a confession of the action. *Cæteri*: It is not a direct confession, but as an admittance of the debt, and it is after imparlance; and they affirmed the judgment. 1 *Levinz* 286. *Noell v. Nelson*.

Scire

Scire facias Teste 12 Feb. the last day of *Hil.* term, by the plaintiff as administrator against the defendant as terre-tenant, who imparled generally, and afterwards demanded *Oyer* of the letters of administration, which did bear *teste* 26 of *March* after, between *Hil.* and *Easter* term in the time of vacation; upon which the defendant pleaded it in abatement. The plaintiff thereupon demurred, because he might not plead in abatement after a general imparlance. But *per Cur'*, It appearing now upon the record, that the plaintiff had brought his action before the cause of action, the court *ex officio* ought to abate the writ; and so they did, although that he could not have *Scire facias* tested after the 12th of *Feb.* till *term Pasch.* in this court; and although *in rei veritate* he might sue after the administration granted in time of vacation. Otherwise it is where the suit is by original out of the chancery, where the court is always open. *tamen Quære* of this judgment; for it appeareth not truly upon the record when the administration bore *teste*, that coming in after general imparlance. *Quære tamen*, for the *Oyer* might be after imparlance. 2 *Levinz* 197. *Harker v. Moreland.*

And now to what we have declared, to direct testators in the due and legal forming of their *wills* and testaments, and executors in the true and regular performing of them: and how men's estates are to be administrated and disposed of, when there is no *will* or testament made or declared by them; it remains only, that we declare what variety of cases and suits have happened for want of the due and legal forming,

or

or true and regular performing of *wills* and testaments, and the resolutions and judgments given thereupon, concerning the various kinds of

Devifes and Legacies.

Devise, is where a man by his testament giveth lands, or tenements, or goods. And if the executor will not deliver goods to the devisee, he hath no remedy by common law: but he must have a citation against the executors to appear before the ordinary, to shew cause why he performs not the *will* of the testator.

For the devisee may not take the legacy, but it must be delivered to him by the executors.

If a man deviseth, either by special name or generally, goods and chattels real or personal, and dieth; the devisee cannot take them without the assent of the executors. But when a man is seised of lands in fee, and deviseth the same in fee, in tail, for life or for years, the devisee shall enter; for in that case the executors have no meddling therewith. And the freehold or interest in law is in the devisee before he doth enter, and nothing in that case, (having regard to the estate or interest devised,) descendeth to the heir. but if the heir enter, or hold the devisee out, he may either enter or have his writ of *ex gravi Querela*. † *Coke's 1 Inst. 111. a.*

Vide ante 222,
& hic ante 11.
& ante Wentw.
p. 26.

† It seems this writ of *Ex gravi Querela* doth not lie without a special custom, although by custom the land be deviseable F. N. B. 459, 4^o margine post 170. Now the Devisee may enter and bring Ejectment, since the Stat. 32 & 34 H. 8.

A devise may create an inheritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law. And the statute provideth, that *Voluntas Donatoris, &c. observetur.* *Coke's 1. Inst. 25. a. post. 174.*

Where a devise to a man, and his heirs male, is a good estate tail. *Coke's 1. Inst. 27. a. post 172.*

Where by a devise to a man, and his heirs male, the son of the daughter shall not inherit. *Coke's 1. Inst. 25. a.*

See 8 Rep. 94.
Manning's case.

If a man by his *will* devise his lands to his executors for payment of debts, and until his debts be paid; in this case the executors have but a chattel and an uncertain interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattel, it shall go to the executors of executors for the payment of his debts. But otherwise it is if a lease be made to a man until one hundred pounds be paid; for there, because the rents are uncertain, the lessee hath an estate for life determinable upon payment of one hundred pounds. *Coke's 1. Inst. 42. a.*

See 2 Wilson
402.

If *Cestuy que use* had devised that his wife should sell his land, and made her executrix, and died, and she took another husband, she might sell the land to her husband; for she did it *en auter droit*, and her husband should be in by the deviser, *Ibid. 112.*

Stat. 32 & 34 Hen. do not take away the custom to devise lands; for an affirmative act doth not take away custom. *1 Coke's Inst. 115.*

Tenant

Tenant in dower may devise corn growing.
Coke's 2 Inst. 81.

If a man make a feoffment to the use of his *will*, or to the use of such person or persons, and of such estate or estates, as he shall appoint by his will: By operation of law the use doth vest in the feoffor, and he hath the use in the mean time, and is seised of a qualified fee, till declaration be made according to his power, and then the estates take effect by force of the feoffment, and the use is directed by the *will*. But if such feoffor by *will* devise the land itself, without reference to his authority, there it shall pass by the *will*. *Coke's 6 Rep.* 18. *Sir Edward Clere's case.* *Hic ante p.* 15.

If a man devise lands to one, and his heirs, and afterwards the devisee dieth before the devisor, the devise is void. For the *will* was alterable at the pleasure of the devisor, and the heir cannot be a purchaser. *Coke's 1 Rep.* 156. *Rector of Chedington's case.*

A devise imports a consideration in itself, and therefore cannot be averred to be to the use of any but the devisee, if it be not expressed in the *will*. No more can a devise be averred to be for a jointure, unless it be expressed in the *will*. *Coke's 4 Rep.* 4 *Vernon's case.*

The writ *ex gravi Querela* lieth, where a man is seised of lands or tenements in any city or borough, or in gavelkind; which lands are devisable by writ time out of mind. Now if such lands be devised in fee-simple or fee-tail, he, to whom this devise is made, shall have this writ *ex gravi Querela*, for to execute that devise.
The

Devises and Legacies.

The remainder in fee to a stranger, if tenant in tail enter and die without issue, he in the remainder shall have this writ. And the heir of the divisor for want of issue, or he who hath the reversion, shall have this writ. *F. N. B.* 459. 4to. *Edit.*

A man deviseth lands in *London* to his wife, upon condition, that if she marrieth, the lands shall remain to his son in tail, and for want of such issue, the remainder to the right heirs of the donor in tail. The wife taketh husband, and she and her husband occupieth the lands, he in the remainder dieth without heirs of his body. The right heirs of the donor shall have a special writ of *Ex gravi Querela*. *Co. 10 Rep. Mary Portington's case*

By custom of *London* a man may devise all his lands; but to his wife he can devise only for life.

The goods of a freeman cannot be devised: but the wife shall have one third-part, and the children another third-part, and the other third-part shall be distributed or disposed of for the good of his soul; and this is called the death's part. *The City Law, pag. 4* And may devise in mortmain.

Devisee of lands may enter into them without livery of seisin thereof to be made to him. *Co. 1 Inst. 112.*

If a man by testament devise that his executors may sell the tenements he hath in fee-simple, after his death the executors may sell the tenements, and put out the heir; but in this case they must all join. But if a man devise lands to his executors to be sold, and one of the executors dieth, the survivor may sell the land,

land because as the estate so the trust shall survive. And what might be done by custom in some particular places when *Littleton* wrote, may now be done generally by *Stat. 32 & 34 H. 8.* And if one executor refuse to sell, the others may sell, but not to him that refuseth.
1 Inst. 113. a.

And it is better to give them an authority than an estate, unless the testator intend they shall have the mean profits till sale. *Co. 1 Inst. 112, 236.*

And here you may note a diversity between a devise which may create or pass an estate, that cannot by conveyance or act executed in life of devisor. *Ibid 42.*

There is great difference between a feoffment of lands upon confidence, or to intent to perform his last will; and a feoffment to the use of such person or persons, and of such estate and estates, as he shall appoint by his will. For in the first case the land passeth by the will, and not by the feoffment, *&c. Coke's 1 Inst.*

Where lands are given to a man, and the heirs male of his body, upon condition that if he die without heir female of his body, that then the donor shall re-enter; this condition is utterly void; for he cannot have an heir female of his body so long as he hath an heir male. *Coke's 1 Inst. 164. a.*

A devise to a man and his heirs male makes a good estate tail, 27. a. But the son of the daughter shall not inherit. *Hic ante 169.*

Lands are devisable according to the custom of several places, as in many places all, in some places only such as the devisor hath purchased.

In

Devises and Legacies.

In some places he may devise any estate: in some places for life only, &c. And *Voluntas Testatoris est ambulatoria usque ad mortem*.

A woman cannot devise lands she hath in fee to her husband, because she is *Sub potestate Viri sui*, and hath not power to devise the same; but a man may devise to his wife.

And it is truly said, the first grant and the last *will* are of greatest force.

This doctrine is exploded, and where the devise is to two, they shall be joint-tenants.

Where in one *will* are divers devises; the last shall stand, *Cum duo inter se pugnancia reperiuntur in Testamento ultimum ratum est*. *Coke's 1 Inst.* 112, 113.

If a lease be devised to one and his heirs male of his body, yet his executors shall have it. For a term is but a chattel which cannot be intailed; and such devisee may well alien the term to whom he pleaseth. *Coke's 10 Rep.* 87. *Leonard Lovie's case*. *Vide ante Wentw. p.* 54. *& post.* 174.

A man devised lands to one for his life, and after to his next heir male and to the heirs males of his body: agreed he hath but an estate for life, because he had express estate for life devised to him, and the remainder is limited to his next heir male in the singular number, and the right heir male of the devisee cannot enter for the forfeiture in the life of the devisee, for he cannot be heir as long as the devisee liveth. And the devisee by feoffment determining his estate for life by a condition in law annexed to the same, it cannot afterwards be revived, and therefore the contingent remainder was destroyed: but if tenant had been disseised and died, it had been otherwise. *Co. 1 Rep.* 66. *Archer's case*.

A devife may create an eftate otherwife than a gift can, yet cannot a devife, direct an inheritance againft rules of law: and the heir in tail male muft make his conveyance by males only, and the female in tail female by females only. Therefore the fafeft way, when a man will in-tail his lands to the heirs male and female of his body, is to limit the firft eftate to him and the heirs male of his body, the remainder to him and to the heirs of his body, and then all his iffues whatfoever are inheritable. *Co. 1 Inft. 25. b. Co. 1 Inft. 377. a. Hic. ante 169.*

If a man devife by his laft *will*, lands or tenements to a man and to his heirs male, this by construction of law is an eftate tail; the law fupplying the words (of his body.)

A man poffeffed of a term for years, by his laft *will* devifed the fame to one and the heirs of his body begotten, and made his executors and dies; the devifee entereth by the affent of the executors, hath iffue and aliens the term, and dieth; this alienation barreth the iffue, for a term of years cannot be entailed. *Co. 4 Inft. 87.*

That the firft devifee cannot bar an executory devife: and that requesting and accepting a thing imply an affent, *Non enim refert an quis affenfum fuum præbet verbis an rebus ipsis & factis.* *Co. 10 Rep. 53. Lampet's cafe.*

Such eftate as cannot by the rules of common law be conveyed by act executed by a man in his life-time by advice of counfel: cannot be devifed by the *will* of a man who is intended in law to be void of counfel. *Co. 1 Rep. 85. Corbet's cafe.*

See the stat. of
mortmain,
9 Geo. 2. ch.
36.

And any man at this day may give lands, tenements or hereditaments, to any person or persons, and their heirs, for finding of a preacher, maintenance of a school, or any other charitable uses. And it is good policy upon every such feoffment or estate to reserve a small rent to the feoffor and his heirs, or to express some such consideration of some small sum. For then, although the statute make the use expressed void, yet the feoffees shall be seised to their own use, and not to the use of the feoffors as they should be without consideration. *Co. 1 Rep. 24, 25. Porter's case.*

In 38 H. 8. *Dyer 61. b. William Whorwood* seised of land to the value of three hundred and sixty pounds, of which sixty pounds was by joint-purchase to him and his wife during the coverture; devised, that his wife should have a third-part of all his land during her life, with those lands she had in jointure; the assignment to be made by his executors, if it were not contrary to law. This widow refused her jointure of sixty pounds, and demanded a third-part of the whole inheritance; *viz.* One hundred and twenty pounds as her legacy, and a third-part of that which remained for her dower, *viz.* Eighty pounds; at last it was by agreement ordered and decreed in the court of wards, that she should have the legacy *ut supra*, and forty pounds over for her dower. *The Woman's Lawyer 185, 186.*

The party had two sons and two daughters, and devised by *will*, that if one died before 21, the other should have her full part. Afterwards the defendant marrying, the survivor was promised to have both portions, and made joint-

ture accordingly. The *will* is void in that point, becaufe by custom the fon fhould have part. *Nicholas contra Dutton*. The like in *Bacon's* cafe, *Totbill's Transactions*. 112. *Edit.* 1671.

Where a devife is void in law by mifrecital of a grant, and lack of an attornment; the court decreed it good. *Bacon's* cafe, *Totbill*.

A devife without attornment good. *Co.* 1 *Inst.* 111, 112. *a.* 322. *a.*

One joint-tenant promifed the other upon his death-bed that he would not take advantage of the furvivorship, but fuffer him to difpofe of it by his *will*, by which he devifed part for the payment of his debts, and the furvivor was ordered to make the eftate accordingly. *Cary's Rep.* 81. *Spring et ux' v. Upton*.

A devife to an heir on condition to fell, void in law, yet good by way of truft in equity. *Cafes in Chanc.* 177, 179.

A devife of all eftates real and perfonal for payment of debts is a devife in fee. *Ibid.* 197.

A devife to two legatees equally; the devife is joint, and yet the intencion prevents furvivorship, *Ibid.* 239.

Portions devifed out of lands payable at prefixed days, which the premisses will not do, amounts to a devife to fell. *Ibid.* 129.

By the Stat. 32 *H.* 8. *cap.* 1. every one (except a woman covert, and infant under the age of one and twenty years, or a perfon *De non sane Memorie*) may, by their laft *will* and teftament in writing, or other act lawfully executed in their life, give, difpofe, will or devife, all fuch lands, tenements and hereditaments as

they are solely seised of in fee-simple, or as much as of right in them is, of all such lands, tenements and hereditaments, as they are seised of in fee-simple in coparcenary, or in common, in fee-simple to any person or persons (except to bodies politick and corporate.) And two-parts of three of all such lands, tenements or other hereditaments, as they hold in knights service. See 12 Car. 2. cap. 2. 32 H. 8. c. 1. and 34 & 35 H. 8. cap. 5. Co. 1 Inst. fol. 111. b. Swinb. part 3. sect. 3, 4. and Wing. Abr. of Stat. Title Wills.

All manner of goods and chattels, real and personal, moveable and immoveable, may be divided by *will* or testament, except in some certain cases.

What cannot be devised.

As where two men are jointly possessed of goods and chattels, real or personal, one of them cannot make his *will*, and bequeath his part to another; for when he dies his part goes to the survivor, and so it is in lands, tenements and hereditaments. *Cowel's Inst.* 140.

Nor can a spiritual person, or master of a college, or hospital, or mayor of a city, devise those things which belong to their church, college, hospital or city; nor can the crown or jewels of the realm be devised by *will*, but they may be given by letters patents; and a parson by *will* may devise the corn growing on the glebe land at the time of his death. *F.N.B., Devise* 5.

The husband cannot devise such goods as his wife hath, as being executrix to another, nor such things as are in action, as debts due to her before marriage by obligation or contract, unless

unless he and his wife sue and recover the same during marriage, or that he renew the bonds, and take them in his own name; otherwise, after his death, they remain to her. *Co. 1 Inst.* 351. *b.*

Also if the husband be possessed of a term or lease for years, in right of his wife, he cannot devise it by his *will*, but he may grant it away or dispose of it in his life-time; or if he make no disposition thereof, yet if he survive her, then it falls to him; and in such case, he may devise it by *will*. *Ibid.*

An administrator cannot devise those goods by *will* which he hath as administrator to another person dying intestate, but administration thereof shall be committed to the next of kin to the first intestate neither can an executor devise those goods by way of legacy which he hath as executor; but he may make his testament, and appoint another executor, who shall have the administration of the same goods to the use of the first testator. *Swinb. part 3. sect. 6 Bro. tit. Administrator. pl. 7. Fitz. eod. tit. pl. 3.*

If a woman tenant in dower sow her land, and afterwards marry, and the husband dies before severance of the corn; in this case it remains to her, and he cannot devise it: but if it had been sown after the marriage, he might have devised it. *Doctor & Student, Lib. 1. cap. 20. Co. Lit. 55.*

If the testator hath neither wife nor child at the time of his death, he may then dispose and devise all the clear residue of his goods and chattels, over and above the discharging of his funeral expences, and his debts. *Swinb. part 3. sect. 16.*

Vid. 4 & 5 W.
& M. cap. 2. &
2 Ann. cap. 5.
which give privilege there to dispose of their personal estates, as in other places.

But it is the custom of many places, especially within the province of *York*, that if the testator have a wife or child at the time of his death, that then he can but dispose of half of such his clear goods, and the other half is to go to the wife or child; and if he have both a wife, and child or children, at the time of his death, then the goods are divided into three parts; whereof one part is to the wife, another to the child or children, and the other third part, called the death's part, is left to his disposing; and if no disposition be made thereof, it falls to the executor. But not here, that if the child or children were heirs to the testator, or were advanced by the testator in his life-time, then the testator may devise one half of the clear goods, and the other half shall go to his wife. *F. N. B. Bre. de Rat. part bonorum.*

Note, where the wife and children ought to have a rateable part of the goods of the deceased, be it third part or half, as the case is, there also they ought to have a like part of the debts due by the deceased, after they are recovered by the executor or administrator; but of leases they can have no rateable part, where they use to have a rateable part of the moveable goods and debts recovered, unless it be by special custom of the city, county, deanry, or place where the testator dwelt, and had such leases. *Swinb. part 3. sect. 16.*

This rateable part of the goods to the wife and children is saved to them by the statute of *Magna Charta*: but note, the wife or children cannot sue the executor or administrator for their rateable parts till all the testator's debts be paid, and

and then what remains is to be divided according to the rules aforesaid, into two or three parts before any legacies be paid; for they must all be paid out of the death's part after the division. *Mag. Ch. cap. 18. F. N. B. 284. 4to Edit. b. Co. 2 Inst. fo. 33.*

Legacies may be given divers ways, either simply or conditionally; *that* legacy is said to be simple which is given without a condition annexed to it: and as in appointing an executor, it matters not after what form of words it be; so it is in the bequeathing of a legacy, for it signifies not after what form it be given; so that the testator's meaning do but appear, whether it be in goods and chattels, or lands and tenements. *Swinb. part 4. sect. 4. num. 18.*

Note, That a legacy may be given from a certain time, or until a certain time, albeit the legatary die in the mean time, before the day come; yet the executors or administrators of the legatary may recover the same when once the day is past, as the legatary himself might have done if he had lived so long; unless the meaning of the testator be to the contrary, or that it be such a thing as cannot be transmitted to the executor, as personal service: but if the legacy be given after an uncertain time, as where the testator gives to *A. B.* one hundred pounds when his son shall die, or the like; there if *A. B.* die before the time come, there the executors or administrators of *A. B.* can then recover nothing. *Swinb. part 4. sect. 17.*

Note, That a legatary may not of his own authority take the legacy and serve himself, but must receive the same at the hands of the

This may be good in the spiritual court, but is not law with us, vide ante 223.

executor; except in some cases, as where the legatory is possessed of his legacy at the time of the testator's death; for in such case he may retain and keep it, if there be sufficient assets besides in the executor's hand to pay the testator's debts; or if the testator give licence to the legatory to enter to his legacy, then he may do it, without the executors consent; and if he be both legatory and executor, then he may serve himself. *Swinb. part 4. sect. 4. num. 23.*

If the testator bequeath to *A. B.* all his goods; in this case it is the opinion of some, that *A. B.* shall have the testator's whole estate, actively and passively, (only his lands, tenements and freehold excepted) being in effect, his executor or heir, as the civil law terms him, and is hereby chargeable with the testator's debts so far as the goods will extend. *Swinb. part 7. sect. 10.*

But others are of opinion, that if a man grant *omnia bona*, (that is all his goods) in this case leases for years, nor a ward, nor things in action, as debts upon promise or obligation, shall not pass thereby, for these are chattels. *Kitch.*

But if the testator do bequeath to *A. B.* all his chattels, in such case he shall have the testator's whole estate, leases and wards too; for *Catalla* includes all but freehold as well immoveable as moveable. *Swinb. part 7. sect. 10.*

But note, that *A. B.* by such devise shall not have glass of the windows, wainscot, tables dormant, fats in the brewhouse fixed to the freehold, nor furnaces, nor the box or chest wherein the testator's evidences are; nor hawks, nor hounds,

Vide ante
Wentw, p. 57.
to 63.

hounds, nor doves in the dovehouse, nor fishes in the pond, nor deer in the park; for these things belong all to the heir. *Kitch.*

Note also, that if *A. B.* die before he have proved the deceased's *will*, wherein he bequeaths to him all his goods, or all his chattels as aforesaid, yet in such case administration shall be committed to the next of kin to the said *A. B.* and not to the next of kin to the testator. *Swinb. part 4. sect. 10.*

But if the testator in either of the cases make another man executor, then the legatory shall not enter into the whole estate of the deceased; but the executor proving the *will* is to enter, and may receive or sue for all the debts due to the testator, and stands also chargeable with the payment of the debts, and what remains is due to the universal legatory. *Swinb. part 7. sect. 10.*

If the testator bequeath to *A. B.* all his moveable goods; here the legatory may recover all the testator's personal goods and cattle, both quick and dead, which either move themselves (as horses, sheep, oxen, swine, &c. or can be moved by another, as household-stuff, plate, plough-geer, wains, carts, corn in the barns or garner, and also corn growing on the ground. And such debts as were due to the testator, and did arise by reason of such moveable things, and for recovery whereof there lieth an action personal, do also belong to the legatory; but the legatory cannot sue for the same in his own name, if another man be made executor; but the executor must sue for the same, and after
re-

recovery, deliver the same to the legatary.
Swinb. part 7. sect. 10.

What things
pass, or not, by
the bequest of all
his household
stuff.

If the testator bequeath to one all his household stuff: in this case he shall have all the tables, forms, stools, chairs, trunks, chests, cupboards, bedsteads, curtains, vallance, rugs, blankets, and all manner of bedding; and also hangings, carpets, and all manner of linen, as sheets, table-cloths, &c. basons and ewers, candlesticks, salts, flaggons, pottingers, sawcers, &c. bowls, barrels, and all manner of vessels serving for meat or drink, whether they be of earth, wood, glass, pewter, brass, or silver, or gold, if they were used in the daily service of the house, and not kept for ornament only, and also pots, pans, spits, racks, and the like; and lastly, coaches by some are held to pass by the name of household-stuff. *Ibid.*

But apparel, books, weapons, artificers tools, cattle, victuals, corn in the barn or granary, wains, carts, ploughs, &c. and vessels affixed to the freehold, do not pass by the name of household-stuff. *Ibid.* but *Quære* as to some of these things fixed, which at this time will pass by the name of *household-stuff* as coppers grates, &c.

If the testator having store of young colts, willeth his executor to give to *A. B.* two colts of the age of two years, and after the making of his *will* liveth many years; in this case there is due to the legatary two of the first colts, which were extant at the time of the *will* making, and not of the last colts at the time of his death. *Ibid. sect. 11.*

If the testator bequeath to *A. B.* all his goods which are in such a place, and afterwards he brings

brings more goods thither, and then dies; here the legatary shall have only those goods which were there when the *will* was made, and not those goods too which were brought thither afterward. *Ibid.*

But if the testator had said I bequeath to *A.* *B.* all my goods which shall be in such a place, or all my goods which may or can be found in such place; here all the goods in that place, at the time of the testator's death, are due to the legatary, though they were brought thither by the testator after the making of his *will*.

Ibid. 11.

If the testator bequeath to *A.* his herd of cattle, and there is but one left at the time of his decease, the legatary can recover no more.

Ibid.

If the testator bequeath to a child in the mother's womb one hundred pounds; in this case, if the mother bring forth two or three children at that time, the legacy is to be divided amongst them. *Swinb. part 4. sect. 20.*

But if the testator say, if my wife bring forth any child, I give to the same one hundred pounds. Here if she bring forth two or three children at that time, then every child shall have one hundred pounds, if the testator's goods do suffice to satisfy the same: unless it be sufficiently proved that it was the testator's meaning, that they should have no more but one hundred pounds among them. *Ibid.*

Where the testator doth bequeath ten pounds to *A. B.* remaining in such a chest, and at his death only five pounds is found in the same chest. In this case the legacy is good for only
the

Devises and Legacies.

the five pounds found in the chest, and no more. *Swinb. part 7. sect. 15. num. 15.*

If the testator do imagine himself to be indebted to another person, and doth bequeath that debt to the same person, which he erroneously supposeth he oweth him, not expressing any sum, in this case the legacy is void; but if he say, I do bequeath ten pounds to such a person which I owe him, whereas the testator knows he owes him nothing, yet in this case the legacy is due, notwithstanding the false demonstration; and here the testator is not presumed to err, unless the executor make proof of error. *Ibid. num. 14.*

If the testator bequeath one hundred pounds to the church, not mentioning what church, it shall then be understood of his parish church; or if he name a church, and there be divers there of the same name, and none of them his parish-church; then the executor if he prove the *will*, or the ordinary if he refuseth, may bestow the same on which church he will; but if the testator's parish-church be of the same name, it ought then to be bestowed there. *Swinb. part 7. sect. 8.*

Where the testator doth bequeath one half of his goods to one person, and makes another his executor, willing and appointing that all his goods shall be divided betwixt them; in this case the legatary shall have half before debts paid, and the executor the remainder after debts paid: As where the testator hath goods to the value of one hundred pounds, and oweth twenty pounds out of the same; here the legatary shall have fifty pounds, and the executor shall pay

pay the twenty pounds debt out of his half.
Cowel's Inst. p. 146.

If a man bequeath twenty pounds to *A.* and twenty pounds to *B.* and twenty pounds to *C.* and makes his executor and dies, having goods but to the value of twenty pounds in all, of which goods the executor makes an inventory; in this case he may pay which of the three he pleases his whole legacy, and the other two are without remedy; or he may, if he please, pay every one of them a rata'b'e part; and if in case the executor make no inventory, yet he is chargeable no further than the value of the goods; and so if every legatary in such case should sue him, they must prove sufficiency of goods, or otherwise they should get nothing. *Dr. & Stud. lib. 2. cap. 10.*

Vide post p. 193.
 that he cannot pay one legatee the whole, tho' his legacy is become due, and the rest not.

If the testator say, I will that *A. B.* shall have an horse; here the election belongs to the legatary: but if he had said, I will that my executor give to *A. B.* an horse, then the election belongs to the executor; and if the words of election be directed to neither of them, then the legatary shall make the election, if there be any such thing extant amongst the testator's goods as is bequeathed; and if not, then the executor is to make the election; and in case where the legatary chuseth, he must not take the very best, unless there be no more but two of the things extant; for so he may do when the testator grants him the election, and as the legatary may not chuse the best, neither may the executor obtrude the worst of those things extant; and where there is no such thing extant, then
 the

the executor is to provide a competent thing for the legatary.

If the testator bequeath two horses to two men, having no more, and one of them is a great deal better than the other; in this case, he that is first named in the testament shall have the election.

If the testator give to *A. B.* twenty pounds if he will; in such case *A. B.* must express his willingness to accept thereof by some means, or else the legacy is not due; and if he die before such expression, then the legacy is lost, and shall not go to his executors or administrators, which otherwise it would, if no such condition had been expressed. *Swinb. part 4. sect. 6. num. 7.*

If an executor have a legacy left him by his testator, and refuseth to stand to the executorship, in such a case he loseth his legacy. *Swinb. part. 6. sect. 2.*

But if the executor be not duly admonished to take the executorship upon him; then if he be the testator's kinsman, or such a person to whom the testator would have given the legacy though he did not perform the *will*, and take the office upon him; in such case he shall not lose the legacy by the refusal of the executorship, neither shall the wife lose her thirds, nor the children their filial portions, nor the creditors their debts, if any of them be made executors, and refuse to take the office upon them. *Swinb. part 6. sect. 3. num. 15.*

See more before in the particular treatise concerning executors.

If

If a legacy be bequeathed to a city orphan in any part of *England*, the executor may be compelled to give security (for payment of it) to the court of orphans. 1 *Vent.* 180.

23 & 24 Car. 2.
B. R. in Har-
wood's case.

A. deviseth land to *B.* for life, paying yearly to *C.* during the life of *B.* 6 *l.* rent at *Michaelmas*, and if unpaid, that *C.* might distrain for it: It seemed that this word *Paying*, in this case, is not a condition for breach whereof *B.* should forfeit his estate, because a distress for the rent is given by the *will* to *C.* 1 *Rolls. Abr.* 411. *I. pl.* 3.

The wife may not be suffered, though to good uses, to dispose of any money she hath raised out of her husband's estate by frugality. But otherwise it is of monies raised out of a separate maintenance. *Cases in chancery* 117, 118. *Dame Marg. Pridgeon* against the executor of her husband.

Lands devised for the payment of debts and legacies, the personal estate shall be first applied; for the implied intent must not without clear expression alter the equitable general law. *Cases in chanc.* 297 *Lord Grey* against *Lady Grey*.

Legacy not attachable by foreign attachment. *Cases in chanc.* 257. *Chamberlain* against *Chamberlain* and others

A citizen of *London* cannot devise his child's part over to another, in case his child die in his minority. *Cases in chanc.* 199. *Pate* against *Halton*.

A conveyance for years is not a revocation of a devise in fee, but *pro tanto* only. *Cases in chanc.* 193. *Barber* against *Took*.

Lands contracted for by a purchaser pass by a devise of the purchaser. *Cases in chan.* 39.

2 Chan. Ca. 144.
3 Salk 85.

A devise of the profits till a child come to 21 years of age, is a good devise of a term till the child would be 21, though he died before. *Cases in chan.* 114. *Creditors of Church against Church.* 3 Co. 20. b. *Boraston's case, S. P.*

If the feoffment made be to the use of his last will, although he deviseth land with reference to the feoffment, yet it taketh effect only by the *will*.

2 Wilfon 254,
255.

A man cannot during his life convey an estate to his wife in possession, reversion or remainder: but he may by deed covenant with other to stand seised to the use of his wife, or make a feoffment, or other conveyance to the use of his wife: and now the estate is executed to such uses by the Stat. 27 H. 8.

See 2 Stra. 1253.

All devises of land void, except in writing with three or four witnesses. †

And no revocation of such *will*, unless in writing or burning, or cancelling by the testator, or by his consent. *Stat.* 29 Car. 2 *Wing. Abr. Frauds* 17, 18.

A termor of a house for 40 years devised the same by his testament without limitation of the estate which he gave: it shall pass the whole term, for the devisee may not have an estate in the messuage at will, nor for term of life, nor any term for years or a year. Therefore the entire term shall pass *per opinionem Justiciariorum de Banco.* *Dyer* 307. *Pl.* 69.

W. seised in fee of a messuage in *London*, by his testament in writing devised it by these

† See 25 Geo. 2. c. 6. whereby creditors and legatees are made competent witnesses to wills.

words: *Item*, I give the fee-simple of my bigger house in *Soper-lane* to my cousin *A. L.* and after her decease to *W. L.* her son (which *W.* was her heir-apparent) and died. *A.* entered and took husband, and had issue by him, and died. If the husband should be tenant by the curtesy. Upon a special verdict *in ejectione firmæ* the opinion of the court was, that the feme had an estate but for term of life, the remainder to *W.* her son for his life, and the fee-simple to the feme; so the husband should not be tenant by the curtesy. *Et sic adjudicatur. Dyer 357. Pl. 44.*

When the intent of a man expressed in his testament doth not agree with the law, the intent shall be taken as void. As if a man devise land to *H.* in fee, and if he die without heir, that *M.* shall have the land; this devise to *M.* is void, for a fee-simple cannot depend upon a fee-simple. *Dyer 4. Sect. 10.*

If a man will that his feoffees shall make an estate in tail to *A.* It is a good devise according to the intention of the devisor. *Dyer.*

Infants within age may not make a devise, Vide 34 H. 2. nor women covert may not devise their tenements by licence of their husbands, nor in other manner during the coverture.

Where a man hath devised by his testament enrolled, a certain rent to arise out of his tenement within the city of *London* without clause of distress; yet, by usage of the said city, he to whom the devise is made may distrain, and avow the taking, if the rent be behind. And in the same manner shall be done of all the ancient rents called quit-rents within the same city.

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A termor devised his term to one whom he made also his executor; the devisee entered before any probate of the testament, and occupied the land a year and more without any probate and died. *Quer*, If his executor (if he made any), or if his administrator if he died intestate, should have the term or not, or that the ordinary should commit the administration as of the first testator; and it was ruled there that the property of the term was in the executor by his entry, and executing of the devise without any probate. *Dyer* 367. *Pl.* 39.

By the custom of *London*, a foreigner as well as a citizen freeman may devise his tenements in *London*, which he hath in simple-fee to another in fee: but such devise may not be made in mortmain, unless by a citizen or freeman of the city. *Dyer* 255. *Pl.* 3.

Brown contra,
because the *will*
comprehends all
the hamlets.

A man seised of lands in fee in one town, and in two hamlets of the same town, and by his last *will* devised all his lands being in the town, and in one of the two hamlets by name, and died. And the opinion of divers justices was, that nothing in the other hamlet should pass. *Dyer* 261. *Pl.* 27.

A man seised of lands in fee made his executors *A.* and *B.* and by his last *will* would, that his executors should have and hold the issues and profits of two parts of his lands, till his heir by the common law came to the age of 21 years, to the intent, that with the profits thereof, they should pay his debts, and perform his legacies, and for the education of his children. One executor died, the survivor made his executor and died, the heir being yet within age. The question
was

was, if the executor of the survivor might meddle with the profits of the lands, and with the disposition thereof during the nonage. And it seemed he well might; for it was an interest in the executors by the devise, and not an authority or confidence only. *Dyer* 210. *Pl.* 24.

A man devised lands to be sold by his executors, the money raised thereby to be disposed in legacies particularly expressed in his *will*, and one of the legataries after the probate of the testament sued in court christian for the legacy. If prohibition did lye in this case was the question; and as it seemed to the judges it did not lie, for that the money was assets in the hands of the executors, and no remedy for the legacy in the temporal court. *Dyer* 264. *Pl.* 41.

Coke took a good difference in *Neston* and *Sharp's* case, *Cr. Eliz.* 466. when a bond is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day (if he sues for a legacy) for it is a duty presently by the condition; otherwise, where a statute or obligation is for the performance of covenants, or to do a collateral thing, there until it be forfeited, it is not any plea against a legatee, for peradventure it shall never be forfeited, and may lie *in perpetuum*, and by such means no *will* should be performed; but in such case, the executor shall make a conditional delivery of the legacy, (*scil.*) if the obligation be recovered, then the legatee to redeliver the legacy. *Rolls Abr.* 928. *S. C.*

Pynes's case was cited by the lord chancellor, wherein it was resolved, that where one had secured portions for his children of 100 l.

Cited in Trin,
23 Ca. 2.

a-piece, and after by his *will* devised to each of them 100 *l.* as a legacy: that this would not double their portions, unless it be plainly proved that he intended so to do. 2 *Ven.* 348.

One divideth to *J. S.* all his goods, chattels and household stuff, and there was 407 *l.* in ready money in the house, and he had devised to *A.* 1200 *l.* by the said *will*. The court declared, that as to the 407 *l.* though the words were general, yet considering the intention of the testator, who by his said *will* had given to her a legacy of 1200 *l.* if he had intended to have given her 407 *l.* more, he might in the same place of his *will* have given her 1600 *l.* And decreed, that the 407 *l.* should come into account of the personal estate. *Chanc. Rep.* 190.

Several legacies are given, the first is due, the other is not due till afterwards, the executor may not pay the first whole legacy to the first, if there be not assets to pay the rest.

In *Grove* and *Benson's* case, legatees were decreed to abate in proportion, where there was not enough to pay all debts, though one of the legatees have a statute and a mortgage for his security of the legacy, and his legacy continued no longer a legacy; yet his legacy not being paid, he was decreed to abate in proportion. 21 *Car.* 2.

Legacy of 125 *l.* was given to the plaintiff to be paid at ten years of age, and at that age it was paid to the father, who after died insolvent; the infant at full age sued the executors of the devisor for the 125 *l.* The lord keeper

Halloway and Collins, 1 Chan. Ca. 245. But since that case the matter is well settled, and payment to parents disallow-

ed, as in the case of *Doyley & Tolferry*, 1715 Mich. Eq. Abr. 300. pl. 2, 58. pl. 6. Vern. 261. Gilb. Eq. Rep. 103. Will. Rep. 285. Gilb. Chancery, 331.

held

held it good payment. But it appeared that the executor took bond to save him harmless, and then he took the security at his own peril, and therefore decreed the executor to pay it. *Halloway's case*, 26 E 27 Car. 2.

A. by his *will* gives 800 l. to C. to be paid by his executor when C. shall attain to the age of 21 years. The infant by his guardian exhibits his bill to have the legacy secured; and it was decreed accordingly.

Legacies may be recovered in the spiritual court against an administrator, with the *will* annexed, or against an executor of his own wrong, as well as against an executor by right. *Rolls* 919. †

A man seised in fee devised the land to his eldest son *Thomas* for life, and if he died without issue living at the time of his death, to *Leonard* another son and his heirs, but if *Thomas* had issue living at the time of his death, then the fee should remain to the right heirs of *Thomas* for ever. *Thomas* entered after the death of the deviser, and suffered a common recovery (under which the defendant claimed) and died without issue, whereupon *Leonard* entered, and made the lease to the plaintiff; and this case was argued at the bar twice, and two questions were put; First, if *Thomas* had by the *will* only an estate for life by the devise, with a contingent remainder to *Leonard*, or that the fee was vested in *Thomas* with an executory devise to *Leonard*. Secondly, if it be an executory de-

† An executor is a trustee for a legatee with respect to the legacy; and this is the only reason, why the legatee may bring his bill in equity against the executor for a legacy, supposing it to be a trust. Will. Rep.

wise to *Leonard*, whether the common recovery did bar it ; and after divers arguments it was resolved by the whole court, that *Thomas* did take only an estate for life by the *will*, the remainder to his heirs not executed ; and although that he be heir to whom the reversion should descend, it shall not drown the estate for life contrary to the express devise and intent of the *will*, but should leave an opening, as they termed it, for the interposition of the remainders, when they should happen to interpose between the estate for life and the fee ; and they compared it to *Archer's* case, *Co. 1 Rep.* where although that *Robert* the devisee for life was heir, yet the remainder to his next heir male was contingent, and not an estate for life to drown by the descent of the reversion ; and so the estate of *Thomas* here being no other than an estate for life by the devise, the remainder to *Leonard* was a contingent remainder and barred by the recovery ; and then the second point will not come in question, whether an executory devise shall be barred by the recovery. But upon the first point they all gave judgment for the defendant. 1 *Lev.* 11. *Plunket v. Holmes.*

In ejection in the Common Pleas, and upon special verdict, the case was, That *Ramsay*, an alien *Scot*, before the union had issue four sons, *scil.* *Robert*, *Nicholas*, *John* and *George*. *Robert* had issue three daughters yet living, *Nicholas* had also two sons, *Patrick* and *William* yet in life, *John* had no issue, *George* had issue the lessor. *John* being seised of the lands in question, devised them to the heir of *Nicholas* and his heirs, *John* and *Robert* being before naturalized
by

by act of parliament, with words, That they ſhould inherit to any ancestor, lineal or collateral, as fully to all intents and purpoſes as if they had been natural ſubjects born in *England*. *John* and his wife are dead, and alſo *George*; *Patrick* the eldeſt ſon of *Nicholas* entered as heir of *Nicholas*, claiming by the deviſe, againſt whom the leſſor brought an ejection as ſon and heir of *George*, and brother and heir of *John*; and this caſe being argued in the Common Bench two points were made: Firſt, if the deviſe to the heir of *Nicholas* was good; and reſolved by *Bridgman* and the whole court, that the deviſe was void. 1. Becauſe that *Nicholas* was in life. *Et nemo eſt Heris viventis*. 2. *Nicholas* being an alien, might not have any heir by our law; heir he might have in *Scotland* not in *England*, where the lands are which the deviſe concerned. But then the queſtion was, ſecondly, if the plaintiff had any title, or if the lands ſhould eſcheat; and upon *that* the queſtion was, if *John* and *George* being aliens, ſons of an alien might be heirs, or inherit the one to the other, by the act of parliament, being naturalized as before. And after many arguments in the exchequer chamber, it was adjudged, that the one brother ſhould inherit the other by virtue of the ſaid act of parliament.

And it was agreed, That where a man had two ſons, and after is attainted, that the ſons ſhall inherit the one to the other, becauſe they had inheritable blood derived from their father and mother before the attainder, which could not be taken away by the attainder afterwards. And for this reaſon each of them might inherit

to their mother the lands which came by her ; but if the attainder had been before the birth of the sons it had been otherwise. 1 *Lev.* 59. *Col-lingwood v. Pace.*

1 *Vent.* 413.

In ejectment and special verdict, where a man seised of lands in *Newcastle upon Tyne*, where the lands are devisable by parol by the custom : by a parol *will* a devise was in these words, *I give all to my mother, all to my mother.* And if the lands should pass by these words was the question. It was argued by *Glyn* the king's serjeant for the plaintiff, who said, that *All* was uncertain whether intended lands or goods ; and by *Jones* for the defendant, who said, *Qui omne dat nil excipit*, and cited a case where by the devise of all his estate, all the estate as well real as personal did pass, and *Benlow* 6. Devise of all his livelihood extended to land and goods. But *per Cur'* *All* is uncertain, and not sufficient to disinherit an heir, and gave judgment for the defendant that the lands did not pass by the *will.* 1 *Lev.* 130. *Roman v. Milbank.*

In ejectment and upon *Non cul.* a special verdict. A man seised of a close upon part of which was a house, and upon another part of it a kiln, and also of two mills adjoining to the close, and used them all together till the year 1655. then he divided and sold the house and a part of the close, and reserved the other part and the kiln, and used them with the mill (and in truth the kiln was a kiln for drying of oates, and the mills were for making of oatmeal, but it was not found by the verdict) and afterwards he sold the mills with the appurtenances to the plain-

plaintiff; and if the kiln, and the parts of the close on which it stood, passed for the defendant was the question; and held clearly by the court that they did not pass. 1 *Lev.* 131. *Archer v. Bennet.*

A baron and feme were seised of a copyhold to them, and the heirs of the baron; the baron surrendered to the use of his *will*, and devised them to the heirs of the body of the feme, if they should attain to the age of fourteen years, and died without issue: the feme took a second baron by whom she had issue, but before the issue attained to the age of fourteen, the feme and the second baron suffered a recovery in the court of the manor; and if the heir of the feme should have the land, (the feme being dead) or not was the question. Argued at the bar several times, and divers points were moved and argued; 1. If this devise were in any wise good being to a person not *in esse*. 2. If it might be good in respect of a double contingent, or a possibility upon a possibility, *scil.* of the feme having any heir of her body at all, and if she had heir of her body, if it should be of the age of fourteen at the time of her death. 3. If the devise should be good, what estate should it be, *scil.* a remainder or an executory devise. 4. If it should be barred by the recovery; and the judges delivered their opinions. As to the first point. that a devise to an infant *in ventre sa mere* is good, and that a devise to an infant *in ventre sa mere* when he shall be born is all one; and they held the devise good notwithstanding the double contingency; and as to the third point they

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they all agreed, that if this devife ſhall be good, it ſhall be by way of executory devife, which may well be allowed to take place within the compaſs of a life, but not after one dying without iſſue, for that would make a perpetuity; and it ſhall not be by way of remainder, for although that the feme had an eſtate for her life, yet this is a new devife to take place after her death, and not as a remainder joined to her eſtate: as to the fourth, if it ſhall be an executory devife, they all agreed, that it ſhall not be barred by the recovery at common law, according to *Pell and Brown's caſe*, 2 *Cro.* 590. *a Fortiori*, in this caſe of a copyhold, the recovery is no bar without cuſtom, and no cuſtom is found to bar eſtates by common recovery; but the court being divided in the principal point, no judgment was given, but the cauſe was agreed to be adjourned into the exchequer chamber. 1 *Lev.* 135. *Snow v. Cutler.*

Ejectment and ſpecial verdict; *Robert Keepe* ſeiſed of *Spains-hall* ſettled part of it upon his daughter for life, and afterwards by *will* deviſed the houſe to his wife for one year after his death, and then deviſed all his lands not ſettled or deviſed to *Thomas Keepe*, to hold to him and his heirs after one year after his death, and after the death of his daughter, and died, the year after his death was expired, and the daughter is yet in life, and ſhe brought the ejectment for the houſe, and if it did lie during the life of the daughter was the queſtion, argued at the bar only; for it was admitted that though the devife was of land not deviſed or ſettled, and not of the eſtate not deviſed or ſettled, yet the
the

the reversion would pass by the devise of the land, although that the land was the same settled and devised before, and should take the residue of the estate in the lands; and it was resolved, that the estate of the house passed immediately after the year after his death was expired, and should not stay till both parts of the copulative were ended, that is to say, till after the year, and after the death of the daughter, but should be taken distributively; *scil.* That the house should pass immediately after the year expired, and the residue after the death of the daughter; and *Gilbert v. Wittie's case*, 2 Cro. 655. 3 Cro. 199. Co. 5 Rep. *Wyndham's case* were cited, 1 Lev. 212. *Coke v. Gerrard*.

It was moved to have writings brought in by the defendant to have a special verdict at the assizes drawn up, where the case would be, that a man devised his lands to his executors to be sold for payment of his debts, and the lands being sold, if the money in their hands must be assets at common law to charge them in debt: the writings were ruled to be brought in, and *Twisden* justice said, that he had known it to be adjudged that they were assets at common law without going to chancery. 1 Lev. 224. *Detwicke v. Caravan*.

Upon information that *Stephen Newman* seized of lands devised them to Trinity-college in *Cambridge* for the maintenance of a scholar there, and in the *will* was this clause; that if any by cavil shall hinder this devise, or that the same cannot go to the college by reason of the statute of mortmain, then I devise them to *Robert Newman*

Newman and his heirs, and under this pretence, that by the statute of mortmain the college could not have them. *Robert Newman* entred, and held the possession of lands, whereupon the attorney-general brought this information for to have the lands established with the college. And all this appearing upon the bill and answer, and it being a charity, it was held by the lord keeper *Bridgman*, that it ought to be established with the college by virtue of the statute of 43 *Eliz.* notwithstanding the statute of mortmain, and notwithstanding the clause in the *will*; and so it was decreed. And the lord keeper said, that it did not differ from *Lloyd's* case. *Hob.* 136. 1 *Lev.* 284. *Dominus Rex* versus *Newman* in *Cancellaria*.

Mich. 15 Car. 2.
Garfoot & Gar-
foot, 1 Ch. Ca.
35. Trin. 27.
Car. 2. Fowle
& Green, 1 Chan.
Ca. 262. Pas.
1689. Roll. &
Roll. 2 Vern. 99.

A man devised lands to his wife for her life, and that after her death the reversion should be sold, and the money distributed between the heir and three nephews; the heir refused to sell or to join with the wife in the same. And upon a bill exhibited in chancery against him to compel him to join in the same, the bill was dismissed by the lord keeper *Bridgman*, who held the *will* void as to the sale of the reversion, it not being said who should sell; but, in the house of peers, they, upon advice with the judges, reversed the dismissal, and decreed that the heir should sell; for when no person is appointed to sell, it shall be intended that he shall sell who hath the estate, that is the heir. *Vide* 5 *H.* 7. 12 *B.* per *Hide, Fenwick & Finneux*. A devise that lands shall be sold, and not said by whom, shall be sold by the executors. The like intent when they are to be sold for payment of debts. 1 *Lev.* 304. *Pits* v. *Pelham*.

In

In ejectment and special verdict, the earl of *Newport* being seised, and having three sons living and two daughters, one of which daughters had issue, the wife of the defendant, devised the messuage called *Newport* house to the wife of the defendant in tail: provided, that if she marry without the assent of the earl of *Manchester* and others, or died without issue, then to the lessor of the plaintiff being then and yet an infant; she having no notice of the condition, and being of the age of fourteen years married without the assent of the earl of *Manchester*, &c. with the defendant *Fry*: he entered, and the lessor brought the ejectment, and the case was argued by counsel. 1. Whether this was a condition, or a conditional limitation; for if it be a condition the plaintiff is not heir, and so hath no right of entry, otherwise it is if it be a limitation. 2. Be it the one or the other, yet notice of it ought to have been given to the devisee before the estate shall be determined. 3. If notice be necessary: if the infancy of the one party or the other; for as well the lessor as the devisee wife of the defendant, were so, if that should alter the case. And afterwards all the justices agreed, and gave judgment for the plaintiff: 1. That the proviso did not make a condition, but a conditional limitation: and it would not be a reasonable construction of the intent of the devisor, that if the feme of the defendant make a breach that it should forfeit the estate of the lessor in remainder, but only a determination of her own estate; and for that many cases were cited. 2. The infancy in this case

1 Mod. 86. S.C.
by the name of
Porter & Fry.

case is not material; for the infant took here by purchase, and not to have age, and it is a conditional limitation *in fait*, and infants are not privileged against conditions *en fait*. *Co. Lit.* 233, &c. 3. No notice to be given of the condition, for want of notice shall not excuse in this case, as it did in *Corbet's case*, *Co.* 4. 2. because the devise here is to a stranger, and not to the heir, and the devisee might as well take notice of the condition as of the estate devised to her. Otherwise it is where the devise is to the heir upon such conditional limitation; for the heir might enter upon his general title as heir, without notice of the *will* or condition. Here the defendant had no title, unless by the *will*, and yet entered; and this difference was taken and agreed, where a devise is to one upon condition, and another is concerned and he is more privy, he that is more privy shall give notice to the other; but where both are equally privy and equally concerned, as here the lessor and defendant are, none of them, is obliged to give notice. 2 *Co. Molineux's case*, &c. 2 *Levinz* 21. *Williams v. Fry*.

Mich. 24. Car.
2. in B. R. according to 1
Vent. 225. in
King & Melling,
it was determined an estate for life only, by two judges Twisden & Rainsford against Hale, Ch. J.
1 Mod. 100.
S. C.
3 Mod. 32.

Devise to one for life, and after his death to his issue, with power to make a jointure, is an estate tail; and tenant in tail, with power to make a jointure suffering a common recovery, it destroyeth the power. *Levinz Rep.* 2 part 58.

King v. Melling

W. B. seised in fee of tenant right lands in *Westmorland* made his *will* in these words, *I devise to my cousin W. B. all my tenant right estate at Brigs-end, &c.* By this devise the fee passed, and

and not only the tenant right land for life. 2
Lev. 91. Wilson v. Robinson.

A man devised lands to his wife, that she should dispose of it to which of his infants she pleased: upon the first argument *Vaughan* chief justice, and *Atkins* held, that she might dispose it in fee; *Hugh, Wyndham* and *Ellis* the contrary; but it was adjourned *ulterius arguend'*. 2
Lev. 104. Sir Rich. Saltonstall's case.

See 1 Mod. 139.
S. C. & 1 Salk.
239. S. P.

Ejectment and special verdict. *Remnant* seised of lands in fee having three daughters, *Susan, Anne* and *Elizabeth*, devised to his wife all his lands till his heir should come to 21, paying to his heir ten pounds *per Ann.* and to his other children 20 s. a-piece. *Item.* he gave to *Ann* and *Elizabeth* 140 l. a-piece, and if *Susan* his heir died without heirs before 21, so that the land came to *Anne*, then *Anne* to pay to *Elizabeth* the portion she herself should have had; and if any of the younger daughters died without heir before 21, her portion to be divided between his heir and his other daughter. *Per Cur'* upon argument, it was a devise of inheritance to *Susan*, and she shall have the whole exclusive of her sisters by these words in the *will*, calling her his heir, and often in the *will* mentioning his heir in the singular number. But by the words, if *Susan* his heir die without heir before 21, so that the land fall upon *Anne*, then *Anne* do pay to *Elizabeth* the portion which she herself should have had, is no more than an estate tail, and not a fee-simple. 2. *Lev. 162. Tilly v. Collier.*

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A devife of lands to a man during his exile, he having relinquifhed his county upon difpleafure of the ftates againft him, but not banifhed, was good till he return. 2 *Lev.* 191. *Pageſ v. Voſcius.*

In ejection a man having three ſons *A. B.* and *C.* devifed a part to each ſon without limitation of any eſtate, and if any of them died, his part to remain to the others; one died, and if his part ſhould remain was the queſtion. The reverſion deſcending upon the eldeſt it deſtroyed the contingent remainder to the others, but ſhall be good by executory devife. 2 *Lev.* 202. *Fortefcue v. Abbot.*

A man ſeiſed in fee devifed to a ſtranger, and his heirs after the death of the devifor, and his wife, he dieth, and if the ſtranger ſhould take preſently or not, till after the death of the wife, and that ſhe ſhall have it for her life by implication was the queſtion; and adjudged, that the ſtranger ſhould not have it till after the death of the feme as well as of the baron, and that the heir ſhould take it in the mean time. 2 *Lev.* 207, *Smartel v. Scholar.*

1 *Vent.* 334.
T. *Raym.* 330.
2 *Vent.* 311.

A devife to the heirs of *Robert Durdant* yet living, who then had a ſon named *George*, is a good devife to *George*, and that the remainder was veſted and executed in *George*, and not contingent and deſtroyed by fine by *Higdon* the trustee in the life of *Robert*. 2 *Lev.* 232. *James v. Richardson*

2 *Mod.* 25.

A man ſeiſed in fee of land to the value of 10*l* per *Ann.* devifed legacies to ſeveral perſons to be paid out of it to the value of 120*l.* within a year after his death. and after devifed the ſame

same land without limitation of any estate to one under whom the defendant claimed. The devisee enjoyed lands three years, and paid 30 *l.* of legacies, and after his death the executor secured the residue, the heir of the devisor entered and brought an ejectment. By three of the justices it is a fee, but not conditional, but in trust for to pay; and adjudged for the defendant. 2 *Lev.* 249. *Freaker v. Lee.*

By the conveyances of devise and fine to uses, a rent may be divided without the assent or attornment of the party; because his assent or attornment is not requisite for the perfection of these conveyances, *Levinz 2 part* 240. *Colborn v. Wright.*

The case of an ejectment and long special verdict and *Devastavit* alledged by an executor and denied by him, was thus; A man possessed of a long term for years of the manor of *Wimble*, devised it to his son *John*, and if *John* died unmarried and without issue, all to go to his daughters and their executors; and if *John* be married, and have no issue living to enjoy it, then after the death of *John's* wife to the daughters; *John* died without issue, and made his sisters his executors, and if the sisters should have the estate by the devise of their father, they had not wasted; but if they took as executors to their brother, for whose debt they are sued, they had committed waste; and upon argument and consideration it was adjudged, that the remainder of the term to the daughters by the devise of the father was void, being a remainder to them upon the death of their brother without issue, and therefore they took it as

1 *Salk.* 224,
225, 230.
1 *Lev.* 25, 290.
1 *Mod.* 50, 114.
1 *Cha. R.* 229.
1 *Mod.* 52.
1 *Sid.* 37.
Cro. Jac. 459,
591.
Pal. 333, 336.
1 *Jon.* 15.
1 *Roll. Abr.* 612,
613, 835.
2 *Roll. Abr.*
394.
Vaugh. 272.
2 *Danv.* 523.

executors of the brother; for it is not as the counsel of the daughters would have it, *scil.* to be taken without issue living at his death, and so the contingent to happen within the compass of a life; and yet if it was so, the court held it to be void, according to *Child* and *Baily's* case, 2 *Cro.* for although that it had prevailed in the case of the devise of an inheritance, as in *Pell* and *Brown's* case, 2 *Cro.* 590 yet it had not at any time prevailed in the case of a term; and the court would not extend a devise of chattels to make perpetuities further than it had been before. 3 *Lev.* 22. *Gibbons v. Sommers*, 33 *Car.* 2, in *C. B.*

Nelf. Lutw. 249.

250.

1 *Mod.* 87.

2 *Sid.* 73.

Cart. 170.

2 *Lev.* 58, 59,

162.

3 *Mod.* 104, 123.

Raym. 425.

Hob. 75.

10 *Co.* 78.

1 *Co.* 175.

1 *Lut.* 823.

2 *Cro.* 417, 448,

591.

2 *Rol. R.* 196.

217.

Hut. 85.

Lit. R. 6, 320.

347.

2 *Sid.* 73.

1 *Inst.* 20. b.

27 b.

Cro. El. 40.

Ejectment and special verdict, upon which the case was; *William Day* seised in fee, devised the land to *William Turner* for his life and to his heirs, and for want of heirs of him to *George Turner* in the same manner, and for want of heirs of him to *William Flint* and his heirs for ever. *William* and *George Turner* are dead without issue, *William Flint* is dead, and the lessor is his heir; and *per tout le court* judgment was given for the plaintiff: for *William* and *George Turner* had but estates tail, the remainder in fee to *Flint*; for the words, *for want of heirs of him*, are for default of heirs of his body, according to *Berresford's* case 7 *Co.* 41. Also it is found in the verdict, that *William Flint* was the next cousin and heir to *William* and *George Turner*, although it be not so expressed in the *will*, which proves the intent to be heir of the body; for they could not die without heirs living *William Flint* or some of his heirs. Wherefore

heirs of the body are necessarily to be intended.

3 Lev. 70. *Parker v. Thacker*, 34 Car. 2. *Trin. in C. B.*

In ejectment upon *Non Cul.* and special verdict; tenant in tail made his *will* and devised his land, and after by bargain and sale inrolled conveyed the land to one tenant to the *Præcipe*, against whom a common recovery is had, with voucher of the tenant in tail, to the use of himself in fee; and if by this recovery the *will* was made good, and that the devisee shall have the land by the devise by virtue of it, or that it shall revoke the *will*, was the question. And by *Pemberton* chief justice, and *tout le court*, it was adjudged upon argument a revocation; for by the bargain and sale, and the recovery, all the estate is altered after the *will*. *Levinz* 3. part 108. *Dister v. Dister*.

Ejectment upon demise of *Benjamin Cutter* and *Mary* his wife, and upon *Non Cul.* special verdict found, that *John Church* was seised in fee, and by his wife *Isabel* had issue four sons, *Humphrey*, *Robert*, *Anthony* and *John*, and devised all to his wife for life, if she do not marry, but if she do marry, that *Humphrey* presently after her decease enter, have, hold and enjoy, all the lands to him and the heirs male of his body, the remainder to *Robert* and the heirs male of his body, the remainder in like manner to *Anthony* and *John*, with divers remainders over: and they derived the title from *Humphrey* to the grandson, and from him to the wife of the lessor, *Filiam unicam suam*, and the title of the defendant as heir male of the body of *Robert* the second son; and after argument it was resolved, that the verdict is imperfect as to the

1 Rol. Abr. 614,
615, 616
Raym. 240, 335,
295.
1 Sid. 60.
Parl. Cases 146,
147.
3 Mod. 260.
Goldsb. 93, 109.
Cro. Car. 24.
Dy. 143.
44 Ed. 3, 33.
2 R. 32. b.

1 Vent. 199.
2 Lev. 61.
Raym. 236.
Hob. 217.
2 Cro. 571.
4 Co. 61.
Godb. 51.
Gouldf. 103.
Mo. 543.

Special verdict
finds that a man
has unicam fili-
am suam, ill,

plaintiff; for although that the grandson of *Humphrey* had not any other daughter, he might have a son, according to *Gymlet* and *Sands's* case, 1 *Cro.* upon which by consent the verdict was amended, and made *unicam Filiam & Hæred. suam*. And then the question was, if any intail was made by the *will*, forasmuch as *Isabel* the wife did not marry; and if no intail was made, then the wife of the lessor had the title as heir general: but it was upon argument resolved, that notwithstanding, the lands were intailed by the *will*; for by all the scope of the *will* it appeared that their was an intail intended by the devisor with divers remainders, and rather than this intent shall be defeated, the words shall be taken thus; *scil.* if she marry, *Humphrey* to enter presently; and if she do not marry, then *Humphrey* shall have, hold and enjoy them to the heir male of his body, with the remainders over. Upon which judgment was given for the defendant. 3 *Lev.* 125. *Luxford v. Cheeke, Trin. 35 Car. 2 in C. B.*

1 *Sal.* 241.
2 *Mod.* 286.
2 *Lev.* 60, 79.
Plow. 545.
Ow. 125, 148.
Mo. 593, 665.
Cro. Car. 161.
Cio El. 313,
840.
1 *Co.* 103.

Ejectment, and upon trial before *Charlton* justice, for the poverty of the parties, and to prevent the charge of a special verdict, the case was put to have the opinion of the court, and it was such: A man seised of lands on the part of the mother devised them to his executors for payment of his debts for 16 years, and after to one who was his heir on the mother's side; and if he should take them by descent or purchase by the *will* was the question: and *Charlton*, before that the case was put, inclin'd that he should
take

take by purchase, being the better for him; for then the heir on the part of the father might come to inherit by him before the heir on the part of the mother, and so both heirs inheritable; and so it was argued at the bar by the counsel on that part: but on the other part it was argued, and so resolved by the three justices *Pemberton*, *Windham* and *Levinz*, that the devise was void, and he should take by descent; and it is no more than if the devisor had made a lease for 16 years, and then devised the reversion to his heir; and the descent from him to the heir on the part of the father or mother is but a consequent depending upon the nature of the estate. And it is not like to the case where a man having two daughters devised the lands to them and their heirs; for that the quality of the estate is altered in themselves, and they are thereby joint-tenants, and survivor shall be between them, which had not been if the lands had descended to them as coparceners. And judgment was given according to the opinion of the three judges. 3. *Lev.* 127. *Hedger v. Rowe*, *Trin.* 35 *Car.* 2. in *C. B.*

Ejectment upon demise of *Dorothy Hewly*, heir of *Christopher Hewly*, who being seised of the lands in question in fee made his will in these words, *I devise to my wife*. (now the wife of the defendant) 600 l. to be paid to *William Weddal*, and is in full payment for the lands I purchased of him, (being the lands in question) and already stated in part of a jointure to my said wife during her life, being of the value of 67 l. per Ann. that of *Whiston*, *York* and *Malton*, the lands there

Cro. El. 674.

Cro. Car. 476.

Hob. 32

1 *Leon.* 313.

Poph. 183.

Mo. 7, 31, 359.

2 *And.* 123.

3 *Leon.* 165.

2 *Leon.* 41.

1 *Saund.* 180.

1 *Lev.* 21.

2 *Saund.* 197.

2 *Vent.* 363.

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amount to 63 l. per Ann. in all 130 l. per Ann. being also stated on my wife in full of her jointure. The lands in *Wigginton* (being the lands in question) were not settled upon the wife; and if they should pass by the *will* to her for life was the question. And resolved by *Pollexfen* chief justice, *Rookesby* and *Ventris* justices, that they pass not by the *will*. Here are no words of devise to pass them, nor no intent that she should have them by the *will*, but a mistake that he had settled them before; and therefore they did not pass by implication, as in the case of *H. 7.* where a man devised lands to his heir after the death of his wife, the wife should have them in the mean time, for the lands are devised and to the heir, but not till after the death of his wife; and because that the heir is not to have them till after the death of the wife, the wife should have them in the mean time by implication: but here the lands are not devised at all, but he declares, that they are already settled upon the wife, in which he is mistaken, and it shall not turn to a devise to the wife by implication. But *Howell* justice *contra*; here it appeareth an intent that the wife shall have them; and although that he be mistaken in the way that she should take them by the settlement, she shall take them by such a way as she may; *scil.* by the *will*, rather than his intent shall be frustrated: but by the opinion of the other three justices judgment was given for the plaintiff. 3 *Lev.* 259. *Wright v. Wyvel.* 2 *Vent.* 56. *same case.* *Trin.* 1 *W. & M.* in *C. B.*

Where

Where the plaintiff saith, that he was possessed by virtue of the *will* of the term for 1000 years, where the devise is to him for life only, the remainder to his son, and the heirs male of his body, it is good *per Cur'*. For the remainder to his son is but contingent if any remainder of the term shall be; for every estate for life is, in supposition of law, of greater continuance than any estate for years; and therefore the whole term is in the father during his life, and the remainder to his son is but a possibility. 3. *Lev.* 264. *Douse v. Earle*, 1 *W. & M. Mich.* in *C. B.* in covenant.

C. o. Jac. 590.
Bridg. 1, 3.
Styl. 271.
Win. 55.
Hut. 60.
1 Jo. 17.

In ejectment tried at *Kent* assizes, upon the evidence, the case was such before *Treby* chief justice, and was agreed to be made a case by the opinion of the court. *Allen* by his *will* devised the lands in question in these words; *I give and bequeath to my sons Richard and Robert, and their heirs for ever, and the longer liver of them, to be equally divided between them after my wife's death, all that my messuage, &c.* The wife died, and *Robert* devised his part to the lessor and died; and the sole question was, if *Richard* and *Robert* were joint-tenants or tenants in common of the inheritance; and after divers arguments, it was adjudged by *Treby*, *Nevil* and *Rookesby*, to be a tenancy in common, *Powel* being of a contrary opinion. 3 *Lev.* 373. *Blisset v. Cranwell & alios*, *Pas.* 6 *W. & M.* in *C. B.*

Mo. 350, 594.
Cro. El. 330.
347, 443, 695.
Mo. 558.
Cro. Car. 75.
1 And. 194.
1 Bulst. 113.
Lit. R. 46.
3 Leon. 19.
Hetl. 29.
3 Co. 39. b.
Goldf. 182, 185.
3 Mod. 209.
1 Chan. R. 64.
Lex Testam. 504.
Plow. Com. 541.
Ow. 148.
Co. Lit. 122.
Yelv. 209, 210.

A devise to *A* for life, without impeachment of waste, and if he have issue male, to the issue male and his heirs; and in case *A.* die without issue to *B.* and his heirs. *A.* hath an estate for life
114
only.

Salk. 224.

only. 3 *Lev.* 432. *Loddington v. Kime*, *Trin.*
7 *W.* 3. in *C. B.*

Devise of the land after his debts paid, he afterwards contracts other debts, the land shall revert upon payment of the first debts. 3 *Lev.* 433. *Loddington v. Kime.*

A man made two executors, of whom one made his executor and died, and afterwards the surviving executor died intestate: a legatee sued the executor of the executor, who first died, in the ecclesiastical court for his legacy, who pleaded this matter; which plea they refused, upon which he prayed a prohibition, and it was denied; for the matter is testamentary, and perhaps the executor of the executor hath all the goods in his hands, and is executor of his own wrong. And no other in the case to be sued for recovery of the legacy; and although that the survivor shall have all by our law, it is not so perhaps in theirs; and the matter belonged to their law, and if they proceed ill he ought to appeal, but they shall not be prohibited by this court; and the prohibition was denied.

1 *Lev.* 164. *Gullan v. Gill.*

Assumpsit, and declared, that one J. S. devised a legacy to the plaintiff, and made the defendant executor, and the plaintiff intending to sue him for it; he in consideration of forbearance, promised the plaintiff to pay him; the defendant pleaded several bonds and judgments, and that he had not assets *ultra*. Whereupon the plaintiff demurred, and had judgment without argument; for the assets is not material, if he had any or none, being charged upon his own
pro-

promise in consideration of forbearance, and forbearance of suit for a legacy is sufficient consideration. 2 *Lev.* 3. *Davis v. Reyner.*

A man devised goods to *A.* and *B.* the executor assented to the legacy, and then *A.* died; the executor of *A.* sued in the ecclesiastical court for the part of *A.* for by the ecclesiastical law there is no survivor in such case. *B.* sued for a prohibition and declared, and upon demurrer and argument adjudged, that the prohibition should stand; for by the assent of the executor the interest is vested and become a chattel, and governable by the common law. 2 *Lev.* 209. *Bustard v. Stukely.*

The spiritual court have the probate of *wills*, but a feme covert cannot make a *will*; if she disposeth of any thing by her husband's consent, the property of what she so disposeth passeth from him to her legatee, and it is the gift of the husband: if the goods were given into another's hands in trust for the wife, still her *will* is but a declaration of the trust, and not a *will* properly so called. But of things in action, and things that a feme covert hath as executrix, she may make a *will* by her husband's consent: and such a *will* being properly a *will* in law, ought to be proved in the spiritual court. *Mod. Rep.* 212. *Anonymus.*

In an action upon the case the plaintiff declares, that upon communication of a marriage to be had between the intestate's daughter and the defendant's son, it was agreed, that the intestate

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testate should give the son 50 *l.* with his daughter, and that if the daughter survived the son, the defendant should pay her 100 *l.* after his death, and mutual promises were made between the intestate and defendant to perform the agreement; and shews that the marriage was had, and that the intestate paid the 50 *l.* and died, and that the son died, and assigns breach in the defendant's non-payment *in retardat' administrat', &c.* and upon *Non Assumpsit* it was found for the plaintiff. *Al. Rep. 1. Bafield administratrix v. Collard.*

In an *Eject' firmæ* upon a trial at the bar the evidence was, that one *Warner* by his *will* in writing devised the lands in question to *Henry Ethingam*, and the heirs male of his body, and bailed the writing to a certain person to keep, and four years after died; and about a fortnight after his death this writing was found gnawn all to pieces with rats; yet he, with the help of the pieces, and of his memory and other witnesses, caused it to be proved in the ecclesiastical court; and the court demanded of the witnesses, whether a stranger, that knew not the contents of the *will* before, by joining of the pieces together could tell that the devise of the lands in question was to *Ethingam*, and the heirs male of his body; for they did agree, that if this clause could be made out, though by joining of the pieces, it were a good *will*. But the witnesses said, a stranger could not make out that clause. Whereupon the court directed the jury, that if they found that the *will* was gnawn before the death
of

of the devisor, then 'twas for the plaintiff; if after, for the defendant. *Select Cases* 2. *Etheringham v. Etheringham*.

In *Eject' firm'* upon a special verdict the case ^{2 Vent. 286.} was, That one being seised of the manor of *D.* ^{3 Mod. 328.} and other lands in *Somersetshire*; by his *will* in writing devised the manor to *A.* for six years, and part of the other lands to *B.* in fee; and then comes in this clause, *And the rest of all my lands in Somersetshire, or elsewhere, I give to my brother, and the heirs of his body.* And the question was, whether the reversion of the manor passed or no; for it was said, that the word *rest*, did extend only to such lands as were not devised before; but it was adjudged for the defendant, that the reversion of the manor passed by the devise. *Al. Rep.* 28. *Wheeler v. Walroone*.

Before *Jones* and *Dolbin*, justices of the king's bench, and others, commissioners delegate, the case was, *Mary Shore* made her testament, and of it named *Eliz. Wheeler* her executrix, and gave the residue of her goods to the disposal of her executrix, and Sir *John Shore*, her brother, and died. Dame *Wheeler* not having proved the testament made her own testament, and of it made *Eliz. Tayler* executrix; after the death of Dame *Wheeler* administration of the goods of *Mary Shore cum testamento annexo* was committed to Sir *John Shore*, who by his testament made his wife his executrix, and died, and afterwards administration *de bonis non, &c.* of *Mary Shore*, was committed to the Lady *Shore*,
wife

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wife and executrix of Sir *John*; and the said *Eliz. Tayler*, having prayed administration to be granted to her, it being denied, she appealed to the delegates; and at first it was agreed, that the bequest of the residue by the words aforesaid, was a bequest of the interest, and not an authority only. Secondly, That this interest was not a moiety of the residue, nor did grow by survivorship to Sir *John Shore* in the case of a legacy as it should in a gift of goods at the common law. Thirdly, it was resolved, that though administration might be granted to the appellant and appellee together, yet there was no cause of appeal, and the grant by the judge of the administration was confirmed, and the appellant condemned in 10*l.* costs. *Sir Thomas Jones* 161. *Elizabeth Tayler, appellant, v. Dame Shore, devant commissioners delegate.*

Action in the *Debet & Detinet* was brought for rent, although the plaintiff entitled himself (as executor) to the reversion of the term to which the rent was incident. *Sir Thomas Jones* 169. *Trattle v. King.*

In a *will*, if there be a condition, and after that a limitation, the condition must be limited accordingly. *Calthrop* 3. *Davies v. Kemp.*

Lands devised to two sons and their heirs, one dies in the life of the devisor. The devisor dies without new publication, the survivor shall have all: if both had died, then the heirs could not have taken. *Calthrop* 3, 4, 5. *Davies v. Kemp. Mich. 16 Car. 2.*

One makes *A.* and *B.* his executors, and *wills*, that *A.* and *B.* shall have and hold the issues and profits of his lands, until his heir shall attain his age of 21 years, to the intent that the executors with the profits of this shall pay his debts, and for the education of his children; adjudged, that it was an interest in the executors: had it been only that he should have the over-sight and doing of all his lands and moveable goods, then it had been otherwise; as in *Yelv. p. 73. Carpenter v. Collins.* So in *Dyer fo. 26. pl. 17.* the disposing, setting, letting and ordering of his lands for the government and ordering of his children. It is no interest to sell the land. *Vide Cro. El. p. 678. Piggot and Garnish, Calthrop 26. Courthope v. Hayman.*

A rent is devised to one (*de Novo*) and to the heirs male of his body; and for default of such issue, to another and the heirs male of his body; and for default of such issue, to another and the heirs male of his body; the first devisee having no heirs male suffers a common recovery. This recovery is good, and so the avowry is good. *Calthrop 52. Smith v. Farnaby.*

If I devise a rent to a man, and the heirs of his body, and then devise it to another to begin after that, this is an executory devise, and not a remainder, and cannot be cut off by a common recovery. *Calthrop 53. Smith v. Farnaby.*

Custom of having an heriot, whether the deceased had goods or not, a void custom. *Calthrop 86. Smith v. Paynton.*

William

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William Bezar the testator had four sons, *John*, *Robert*, *William* and *Matthew*, and devised the lands in question to *John* for life, under the conditions and limitations in his *will*, and after his decease to the use of the heirs of his body. This, though it be limited to him for life, is nevertheless an estate tail to him, as well in a *will* as any other conveyance. The estates cannot stand together, but the estate for life is swallowed up in the tail; and the same rule holds where an estate of freehold is limited to a man for life, the remainder to the heirs of his body, it is an estate tail in a devise as well as in a deed. *Calthrop* 171. *Rundale v. Eley and others*.

A man deviseth *Blackacre* to *A.* in fee, and after by the same *will* devised a third part to *B.* for life, or in tail; this last devise to *B.* doth not make void all to *A.* but *B.* shall have an estate in possession, *A.* in remainder. *Calthrop* 174.

J. T. seised of house and lands makes his *will*, and gives it to his son *Robert*, upon condition that he pay his two sisters 5*l.* per *Ann.* to each by four quarterly payments; the first payment to begin at such feast as shall first happen after his and his wife's decease. Afterwards he gives 50*s.* out of the rents. — serjeant. There is a diversity where the money to be paid is a sum in gross, whether it is entire on the land or not, or whether it be to be paid *in presenti* or *futuro*; if so, this shall advance the estate in fee: but if an annual rent or sum be to be paid out of the profits, this makes no larger estate than
than

than the words will bear.— *Sise* serjeant *contra* : Paying generally makes a fee, paying yearly out of the profits alters the case. If it be given so to any one that is not heir at law, it is a condition: I conceive it is a rent-charge upon the land. Take it upon the reason of *Colyer's* case. If here be a possibility that *Robert* shall lose by what he pays under that compulsory condition, *Robert* is at his peril to pay the quarterly payment. *Vaughan* chief justice: Two things are to be considered. 1. For the benefit of the devisees. 2. For the benefit of the legatees; he did intend this land particularly to be charged with these legacies. The entry of the heirs is not always intended by the way of a condition: but sometimes it shall be look'd upon as an executory devise, or as a limitation. I give land to *A.* on condition he shall pay *B.* 10*l.* if he do not, *B.* shall enter. This is no advantage to the heir to enter. *Ellis* justice: In some cases paying shall not make a fee. If it be apparent there is a loss or peril, a fee passeth. *Calthrop* 226. *Thacker's* case.

In a clause of the *will* the words are, *I will and bequeath* (the lands in question) *to my wife during her natural life, and after by her to be disposed to such of my children as she shall think fit.* The question is, what estate the wife hath? A devise to another to dispose as he shall think fit, or at his discretion, is an estate in fee. *Vaughan* chief justice: I agree the cases: I know no difference between devising land to be disposed of by him, and to be disposed at his will and pleasure. But here I hold the wife hath no estate in fee,

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fee, she hath only an estate for life ; but there is a power in her to specify an estate to another : as I covenant to demise land to such persons for as many years as *I. S.* shall dispose it to ; now here is nothing by way of gift, but a power of specification ; and therefore the word *Dispose* carries no fee. This word *Dispose* cannot signify *Give* ; for none can dispose of more than he hath, and there is an estate for life only to the wife. Let us turn the words equivalently ; *I will and bequeath the lands in question at my wife's dispose, to such of my children as she shall think fit.* Now this way the children do take it expressly by the gift of the testator, and the words (at her dispose) are with relation to the children, and not to the estate ; and when she hath disposed of it to any child, that child shall have but an estate for life ; she hath the nomination or specification : but my brothers are against my opinion. *Et il dit subirascent, Sententiæ numerantur, non ponderantur.* Calthrop 232. Anonymus.

And lastly, having supplied what I have thought necessary to make a work of this nature complete, and in all its parts conformable to the present time, and laws now in force ; future times may produce occasions for future additions : but, as perfect to this time, I may at present put thereto.

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